



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

3 2044 078 697 356



HARVARD LAW

6
11 14

REPORT

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ALABAMA

DURING THE

NOVEMBER TERM, 1912-13

o

BY
LAWRENCE H. LEE

Supreme Court Reporter

VOL. 181.

Montgomery, Ala.
BROWN PRINTING COMPANY.
Printers and Binders,
1914.

Entered according to act of Congress, in the year 1914, by
EMMET O'NEAL, GOVERNOR OF ALABAMA,
for use of said State,
In the office of the Librarian of Congress at Washington, D. C.

DEC 1 1 1914

OFFICERS OF THE COURT

DURING THE TIME OF THESE DECISIONS

JAMES R. DOWDELL, CHIEF JUSTICE, LaFayette.

JOHN C. ANDERSON, ASSOCIATE JUSTICE, Demopolis.

THOMAS C. McCLELLAN, ASSOCIATE JUSTICE, Athens.

JAMES J. MAYFIELD, ASSOCIATE JUSTICE, Tuscaloosa.

A. D. SAYRE, ASSOCIATE JUSTICE, Montgomery.

ORMOND SOMERVILLE, ASSOCIATE JUSTICE, Tuscaloosa.

EDWARD DE GRAFFENRIED, ASSOCIATE JUSTICE, Greensboro

ROBERT C. BRICKELL, ATTORNEY-GENERAL, Huntsville

WILLIAM L. MARTIN, ASST. ATTY.-GEN'L., Montgomery

THOMAS H. SEAY, ASST. ATTY.-GEN'L., Montgomery.

ROBERT F. LIGON, CLERK, Montgomery.

JUNIUS M. RIGGS, MARSHAL, Montgomery.

GEORGE D. NOBLE, ASSISTANT MARSHAL, Montgomery

ROBERT THORINGTON, SECRETARY, Montgomery.

ROBERT H. GREENE, SECRETARY, Montgomery.

ERRATA.

Page 168. Randolph v. Vails, 180 Ala. 820, read 180 Ala. 82.
Page 177. Williams v. Vining, 450 Ala., read 150 Ala.

TABLE OF CASES REPORTED IN THIS VOLUME

Aaron v. State.....	1	Combs v. Greene, et al.....	325
Adams v. State.....	58	Cromartie ats. So. St. F. & C.	
Age-Herald Pub. Co. ats. Par-		I. Co.	295
sons	439	Cruise, et al. v. Sorrell.....	237
A. G. S. R. R. Co. ats. Owen..	552		
Allen, et al. v. State ex rel.		Fanley ats. Peerson, et al....	163
Rowe, et al.	383	Daughdrill v. Lockhart.....	338
Arnett, Doe ex dem. ats. B'ham		Day ats. Twin Tree L. Co....	565
C. & I. Co.	621	Dearman ats. Phalln.....	320
Ashurst, et al. v. Ashurst....	401	Dixie Grain Co. v. Quinn....	208
		Doe ex dem. Arnett ats. B'ham	
Barlew, ex parte	88	C. & I. Co.	621
Bass, et al. ats. Jackson L. Co.	169	Drennen Co. v. Jordan.....	510
Beasley v. State.....	28		
Bell v. Shivers, et al.....	303	East ats. Nolen.....	220
Bethune Mule Co. ats. Steag-		Ebersole v. Fields.....	421
all-C. F. Co.	250	Empire I. Co. v. Lynch.....	473
Beyer ats. McLaughlin.....	427	Empire L. Co. ats. Moore, et	
Blish, State ex rel. v. Town of		al.	344
Warrior	642	Enterprise L. Co. v. First	
B'ham C. & I. Co. v. Doe ex		Nat. Bank	388
dem. Arnett	621	Esco, et al. ats. Thornton...	241
B. R. L. & P. Co. v. Coleman	478	Ex parte Barlew.....	88
B. R. L. & P. Co. v. Goldstein	517	Ex parte Livingston.....	94
B. R. L. & P. Co. v. Mayo....	525	Ex parte So. Ry. Co.....	486
B. R. L. & P. Co. v. Nicholas	491	Ex parte State of Alabama...	4
B. R. L. & P. Co. v. Smyer....	121	Ex parte Woodward.....	97
B. R. L. & P. Co. v. Wilcox...	512		
Bishop v. State.....	85	Farrow v. Sturdivant Bank...	283
Blish, State ex rel. v. Thomas,		Faulk & Co. ats. Clements, et	
et al.	665	al.	219
Board of Commissioners Mo-		Felkins ats. Lovell.....	165
bile v. Orr.....	308	Fields ats. Ebersole.....	421
Booze ats. Jeheles-C. C. Co....	456	First Nat. Bank ats. Enter-	
Borum ats. Kidd, et al.....	144	prise L. Co.	388
Bowles v. Lowery.....	603	First St. Bank ats. Metcalf...	323
Bradshaw ats. Phillips.....	541	Freeman ats. Hamner.....	109
Brunson ats. Hanchey.....	453		
Burgess & Co. ats. Presnall...	263		
		Gachet v. Morton.....	179
Cannon v. Prude.....	119	Galliland, et al. v. Williams,	
Carter ats. Harrison.....	321	et al.	173
C. of Ga. Ry. ats. Mauldin...	591	Gaines ats. Hanvey.....	288
City of Mobile ats. Realty Inv.		German v. State.....	11
Co.	184	Gilmer v. State.....	23
City of Mobile Board of Com-		Goldstein ats. B. R. L. & P.	
missioners v. Orr.....	308	Co.	517
Clements, et al. v. Faulk &		Gray ats. Webb.....	408
Co., et al.	219	Greene, et al. ats. Combs...	325
Coleman, ats. B. R. L. & P.		Guarantee B. & T. Co. ats.	
Co.	478	Spink	273

MEMORANDA
OF
CASES DECIDED DURING THE PERIOD EMBRACED IN
THIS VOLUME, WHICH ARE ORDERED NOT
TO BE REPORTED IN FULL.

Continental I. Co. v. Eureka	Sloss-S. S. & I. Co. v. Mitchell	671
S. Works.....	Stacey v. Jones.....	671
Ex parte Letcher.....	Stone v. The State.....	671
Ex parte Strange.....		
E. W. Gates L. Co. v. Givens	Thomas v. The State.....	672
Howard v. The State.....	Thompson v. Ala. State Land	
	Co.	672
Jones v. The State.....	Weatherlow v. The State.....	672

ALABAMA CASES CITED IN THIS VOLUME

Abercromble v. Baldwin, 15 Ala. 363.....	160
Abernathy v. Bozeman, 24 Ala. 189.....	334
Abernathy v. The State, 129 Ala. 85.....	34
Abrams v. State, 155 Ala. 105.....	19
Adams v. State, 175 Ala. 8.....	59
Adler v. Sullivan, 115 Ala. 582.....	277
Agnew v. McGill, 96 Ala. 496.....	276
Ala. Cent. Ry. Co. v. Musgrove, 169 Ala. 424.....	591
Ala. City G. & A. Ry. Co. v. Sampley, 4 Ala. App. 464.....	483
Ala. City G. & A. Ry. Co. v. Sampley, 169 Ala. 373.....	483
Ala. Con. C. & I. Co. v. Turner, 145 Ala. 639.....	589
A. G. S. R. R. Co. v. Boyd, 124 Ala. 526.....	488
A. G. S. R. R. Co. v. Christian, 82 Ala. 307.....	8
A. G. S. R. R. Co. v. Johnson, 128 Ala. 283.....	590
A. G. S. R. R. Co. v. Linn, 103 Ala. 134.....	469
A. G. S. R. R. Co. v. McWhorter, 156 Ala. 269.....	550
A. G. S. R. R. Co. v. Moody, 92 Ala. 279.....	469
A. G. S. R. R. Co. v. Shahan, 116 Ala. 302.....	502
Aldrich M. Co. v. Pearce, 169 Ala. 161.....	538, 539
Alexander v. Rea, 50 Ala. 450.....	277
Alexander v. Saulsberry, 37 Ala. 375.....	172
Allen v. Allen, 80 Ala. 154.....	433
Alford v. First Nat. Bank, 156 Ala. 438.....	353
American Mtg. Co. v. Thornton, 108 Ala. 258.....	353
Ashford v. Ashford, 136 Ala. 631.....	160
Atlanta, B. & A. Ry. Co. v. Brown, 158 Ala. 607.....	585
Atwell v. State, 53 Ala. 29.....	195
Balley v. Dunlap Co., 138 Ala. 415.....	229
Balley v. State, 161 Ala. 75.....	99, 105
Baker v. Selma S. & S. Ry. Co., 130 Ala. 474.....	131
Baker v. Swift, 87 Ala. 530.....	436
Bank of St. Mary v. St. John, et al., 25 Ala. 612.....	379
Baucum v. George, 60 Ala. 266.....	535
Beasley v. Howell, 117 Ala. 499.....	387
Beasley v. State, 71 Ala. 329.....	82
Beason v. State, 72 Ala. 191.....	76
Beatty v. Brown, 76 Ala. 287.....	539
Beebe v. Robinson, 52 Ala. 66.....	388
Bernstein v. Humes, 60 Ala. 582.....	616
Bessemer v. Bessemer W. W. Co., 152 Ala. 391.....	318
Betts v. Sykes, 82 Ala. 381.....	290
B'ham Min. R. R. Co. v. Harris, 98 Ala. 328.....	488
B'ham Nat. Bank v. Bradley, 116 Ala. 142.....	569
B'ham Ore & M. Co. v. Groover, 159 Ala. 276.....	515
B'ham R. & E. Co. v. Baird, 130 Ala. 334.....	483
B. R. L. & P. Co. v. Barrett, 179 Ala. 274.....	563
B. R. L. & P. Co. v. Hays, 153 Ala. 178.....	529
B. R. L. & P. Co. v. Jordan, 170 Ala. 530.....	516
B. R. L. & P. Co. v. Moore, 148 Ala. 128.....	522, 524

B. R. L. & P. Co. v. Parker, 156 Ala. 251.....	515, 516
B. R. L. & P. Co. v. Weathers, 164 Ala. 32.....	515, 516
Black v. Roden C. Co., 178 Ala. 531.....	509
Black v. T. C. I. & R. R. Co., 93 Ala. 109.....	607
Black W. C. Co. v. West, 170 Ala. 346.....	347
Blackburn v. State, 71 Ala. 329.....	82
Blackman v. Mauldin, 164 Ala. 337.....	599
Blackshear v. Burke, 74 Ala. 239.....	342
Bland v. Bowie, 53 Ala. 152.....	628
Bowling v. M. & M. Ry. Co., 128 Ala. 550.....	612
Braham v. State, 143 Ala. 28.....	80
Brand v. United S. C. Co., 128 Ala. 579.....	277
Brannan v. Henry, 175 Ala. 454.....	540
Brasher v. Shelby I. Co., 144 Ala. 659.....	612
Brightman v. Merriweather, 121 Ala. 602.....	436
Brown v. City of Birmingham, 140 Ala. 600.....	318, 319
Brown v. State, 108 Ala. 18.....	83
Brown v. State, 109 Ala. 89.....	47
Brown v. State, 118 Ala. 111.....	83
Bryan v. City of Birmingham, 154 Ala. 447.....	318
Buckalew v. Tenn. C. I. & R. R. Co., 112 Ala. 146.....	562
Burton v. State, 107 Ala. 121.....	77, 83
Burton v. State, 115 Ala. 9.....	77
Busby v. State, 77 Ala. 68.....	22
Byrd v. Bailey, 169 Ala. 452.....	352
Callahan v. Nelson, 128 Ala. 671.....	608
Campbell v. Noble, 145 Ala. 233.....	274
Carleton v. Henry, 129 Ala. 479.....	274
Carlisle v. A. G. S. R. R. Co., 166 Ala. 591.....	490
Carlisle v. Tuttle, 30 Ala. 623.....	627
Carr v. Ill. C. R. R. Co., 180 Ala. 159.....	388
Carson v. State, 50 Ala. 134.....	76
Carter v. State, 103 Ala. 93.....	521, 522
Case v. Hulsebush, 122 Ala. 212.....	460
C. of Ga. R. R. Co. v. Freeman, 134 Ala. 354.....	503, 506
C. of Ga. R. R. Co. v. Keyton, 148 Ala. 675.....	585
Chambers v. Ringstaff, 69 Ala. 140.....	278
Chandler v. Jost, 81 Ala. 411.....	157
Chapman v. Abrahams, 61 Ala. 108.....	230
Chapman v. State, 78 Ala. 463.....	482
Chastang v. Chastang, 141 Ala. 451.....	607
Chattanooga N. B. & L. Assn. v. Vaught, 143 Ala. 389.....	353
City Bank & T. Co. v. Leonard, 168 Ala. 404.....	380
City of Montgomery v. Shoemaker, 51 Ala. 114.....	659
Clancy v. Stephens, 92 Ala. 577.....	608
Clarke v. State, 78 Ala. 474.....	63
Clements v. Hays, 76 Ala. 280.....	607
Coleman v. Stewart, 170 Ala. 255.....	159
Coleman v. Town of Eutaw, 157 Ala. 327.....	189, 191, 196
Coles v. Allen, 64 Ala. 98.....	213
Collier v. Frierson, 24 Ala. 109.....	198
Collier v. Gillespie, 148 Ala. 558.....	437
Collins v. State, 3 Ala. App. 64.....	11
Conrad v. Gray, 109 Ala. 130.....	561
Cook v. State, 5 Ala. App. 11.....	35
Cook v. Malone, 128 Ala. 662.....	341, 342
Cooper v. Watson, 73 Ala. 254.....	539

ALABAMA CASES CITED.

xiii

Copeland v. McAdory, 100 Ala. 553.....	333, 337
Cox v. State, 76 Ala. 66.....	409
Crawford v. Kirksey, 50 Ala. 590.....	340
Creola L. Co. v. Mills, 149 Ala. 474.....	509
Crichton v. Hayles, 176 Ala. 223.....	821
Crittenden v. State, 134 Ala. 145.....	75
Cunningham v. Baker, 104 Ala. 171.....	46
Cunningham v. State, 117 Ala. 59.....	522
Daniels v. Lowery, 92 Ala. 519.....	207
Davis v. Gerson, 153 Ala. 503.....	610
Davis v. State, 152 Ala. 25.....	18
Dawson v. Burrus, 73 Ala. 111.....	503
DeArman v. State, 71 Ala. 351.....	32, 34
Denman v. Payne, 152 Ala. 342.....	325
Dickinson v. Champlon, 107 Ala. 613.....	327
Dickson v. Van Hoose, 157 Ala. 459.....	357
Dinkins v. Latham, 154 Ala. 100.....	610
Doe, ex dem. Hughes v. Wilkinson, 25 Ala. 453.....	611
Donald v. Hewitt, 33 Ala. 534.....	254
Dorman v. State, 34 Ala. 216.....	187, 205
Dothard v. Shields, 69 Ala. 135.....	426
Douglass v. Moody, 80 Ala. 61.....	305
Draper v. State, ex rel., 175 Ala. 547.....	655
Drake v. Lady Ensley Co., 102 Ala. 501.....	581
Drennen v. Jasper Inv. Co., 153 Ala. 322.....	380
Dunn v. Com. Court, 85 Ala. 144.....	656
Durr v. Hanover Nat. Bank, 170 Ala. 260.....	347
Edson v. State, 134 Ala. 50.....	645
Ensley R. R. Co. v. Chewning, 93 Ala. 27.....	506
Evans v. S. & W. Ry. Co., 90 Ala. 54.....	129
Excise Commission v. State, ex rel., 179 Ala. 654.....	387
Ex parte Beavers, 34 Ala. 73.....	357
Ex parte Dickens, 162 Ala. 276.....	8
Ex parte Harris, 52 Ala. 87.....	388
Ex parte Mayor, etc., 78 Ala. 419.....	192, 205
Ex parte Riley, 94 Ala. 82.....	105
Ex parte State, 181 Ala. 4.....	80
Ex parte Stevenson, 177 Ala. 384.....	8
Ex parte Woodward, 181 Ala. 97.....	609
Faircloth v. Carroll, 137 Ala. 243.....	327
Fiebleman v. State, 130 Ala. 122.....	106
Ferdon v. Dickens, 161 Ala. 181.....	414
Fielder v. Childs, 73 Ala. 567.....	159, 160, 539
Fields v. Killian, 129 Ala. 373.....	289
Fields v. State, 121 Ala. 16.....	448
Fies v. Rosser, 162 Ala. 505.....	222
Findley v. State, 61 Ala. 204.....	446
First Nat. Bank v. Chandler, 144 Ala. 308.....	500
First Nat. Bank v. First Nat. Bank, 116 Ala. 521.....	382
Fitts v. Craddock, 144 Ala. 437.....	249
Fonville v. State, 91 Ala. 39.....	78
Forchheimer v. Mobile, 84 Ala. 126.....	319
Ford v. State, 71 Ala. 385.....	80
Fox v. McDonald, 101 Ala. 51.....	094
Frederick v. Wilcox, 119 Ala. 355.....	610

Fuller v. Deason, 31 Ala. 654.....	417
Fulton v. State, 171 Ala. 572.....	385
Gamble v. B. W. Coal Co., 172 Ala. 669.....	218
Gardner v. Knight, 124 Ala. 273.....	173
Gassenhelmer v. W. Ry. of Ala., 175 Ala. 319.....	400, 509
Gaston v. Weir, 84 Ala. 193.....	360
Gayle v. Johnson, 80 Ala. 395.....	249
Georgia H. I. Co. v. Warten, 113 Ala. 479.....	271
Georgia Pac. Ry. Co. v. Hughes, 87 Ala. 610.....	488
Gerrish v. State, 54 Ala. 476.....	75
Gibson v. Goldthwaite, 7 Ala. 283.....	380
Gilmore v. State, 126 Ala. 20.....	7
Godau v. State, 179 Ala. 27.....	62, 63, 84
Goether v. Norman, 107 Ala. 585.....	287
Golins v. Ala. S. & W. Co., 141 Ala. 546.....	476
Goldsmith v. State, 105 Ala. 8.....	585
Goodlett v. Smithson, 5 Port. 245.....	625
Goodson v. Stewart, 154 Ala. 660.....	358
Goodwin v. Sherer, 145 Ala. 501.....	388
Goodin v. Williams, 151 Ala. 592.....	585
Green v. State, 143 Ala. 10.....	57
Gresham v. Taylor, 51 Ala. 505.....	292
Griffin v. Chattanooga So. Ry. Co., 127 Ala. 572.....	220
Griffin v. Isbell, 17 Ala. 186.....	423
Griffin v. Reynolds, 17 Ala. 198.....	333, 334
Griffin v. State, 90 Ala. 596.....	77
Griffith v. Ventress, 91 Ala. 366.....	353
Gulmartin v. Wood, 76 Ala. 204.....	300
Hodjo v. Gooden, 13 Ala. 718.....	56
Hale v. State, 122 Ala. 85.....	521, 522
Haley v. K. C. M. & B. R. R. Co., 113 Ala. 640.....	511
Hall v. Condon, 164 Ala. 393.....	159
Hall v. Hall, 171 Ala. 618.....	327
Hammil v. State, 90 Ala. 577.....	76
Hammon v. Thompson, 56 Ala. 589.....	172
Hancock v. Jordan, 7 Ala. 448.....	292
Harper v. Campbell, 102 Ala. 342.....	236
Hayes v. Lemolne, 156 Ala. 465.....	608
Hayes v. So. Bldg. & L. Assn., 124 Ala. 663.....	352, 356
H. B. Claffin Co. v. Muscogee M. Co., 127 Ala. 380.....	121
Heflin v. Bingham, 56 Ala. 566.....	358
Heflin v. Phillips, 96 Ala. 561.....	333
Henningburg v. State, 151 Ala. 26.....	25
Henningburg v. State, 153 Ala. 13.....	25
Hendricks v. Johnson, 5 Port. 208.....	586
Henry v. Brown, 143 Ala. 446.....	607
Hereford v. Combs, 126 Ala. 369.....	415, 416
H. A. & B. R. R. Co. v. Burt, 92 Ala. 291.....	528
H. A. & B. R. R. Co. v. Dusenberry, 94 Ala. 416.....	500, 501, 502
H. A. & B. R. R. Co. v. Matthews, 99 Ala. 24.....	129
Higman v. Humes, 133 Ala. 617.....	270
Hill v. Helton, 80 Ala. 528.....	465
Hill v. State, 156 Ala. 3.....	94
Hill v. Ward, 13 Ala. 310.....	423
Hodge v. Hodge, 172 Ala. 11.....	323
Hodge v. State, 97 Ala. 37.....	22

ALABAMA CASES CITED.

17

Holley v. State, 105 Ala. 100.....	55
Holmes v. State, 100 Ala. 291.....	277
Homan v. Stewart, 103 Ala. 654.....	182
Hooper v. Dora Min. Co., 95 Ala. 235.....	281
Hubbard v. State, 172 Ala. 164.....	76
Hudson v. State, 61 Ala. 333.....	77
Hughes v. Wilkinson, 35 Ala. 453.....	360
Husley v. Walker Co., 147 Ala. 501.....	321
Hunter v. L. & N. R. R. Co., 150 Ala. 594.....	670
Hussey v. State, 87 Ala. 121.....	26
Independent Pub. Assn. v. Amer. Press Assn., 102 Ala. 475.....	96
Irouc C. M. Co. v. Hughes, 144 Ala. 608.....	501
Isaacs v. Boyd, 5 Port. 388.....	487
Ivey v. Pioneer S. & L. Co., 113 Ala. 359.....	423
Jackson v. Elliott, 100 Ala. 669.....	161, 162
Jackson v. State, 78 Ala. 471.....	32, 56
Jackson v. State, 2 Ala. App. 226.....	254
Jarvis v. Johns, 93 Ala. 239.....	160
Johnson v. Robertson, 8 Port. 489.....	413
Johnson v. B. R. L. & P. Co., 149 Ala. 533.....	515
Johnson v. State, 94 Ala. 53.....	55
Johnson v. State, 32 Ala. 585.....	508
Jones v. State, 63 Ala. 28.....	75
Justice v. State, 99 Ala. 180.....	26
Kellar v. Bullington, 101 Ala. 267.....	215, 539
Kennedy v. First Nat. Bank, 107 Ala. 170.....	113
Kennedy v. First Nat. Bank, 113 Ala. 283.....	113
King v. Kent, 29 Ala. 542.....	628
Kirkman v. Vanlier, 7 Ala. 218.....	277, 321
Kirkpatrick v. Henson, 81 Ala. 464.....	272
Kling v. Tuntstall, 124 Ala. 268.....	119
Knahe v. Burden, 88 Ala. 436.....	624
Knight v. State, 152 Ala. 56.....	75
Knight v. State, 147 Ala. 104.....	75, 76
Lamkin v. L. & N. R. R. Co., 106 Ala. 287.....	484
Langston v. State, 96 Ala. 44.....	292
Lawson v. Hicks, 78 Ala. 279.....	545
Lay v. Fuller, 178 Ala. 375.....	160
Leech v. Karhaus, 141 Ala. 509.....	610
Lehman v. Robinson, 59 Ala. 219.....	192
Lemay v. Walker, 62 Ala. 39.....	645
Lewis v. Gorgette, 3 S. & P. 184.....	535
Lewis v. Paul, 42 Ala. 136.....	426
Lewis v. State, 178 Ala. 26.....	43
Lewis v. State, 120 Ala. 339.....	522
Lein Kauf v. Morris, 66 Ala. 406.....	485
Linnehan v. State, 120 Ala. 293.....	27
Little v. City of Bessemer, 138 Ala. 127.....	388
Little v. Sterne, 125 Ala. 609.....	262
L. & N. R. R. Co. v. Allen, 78 Ala. 494.....	559
L. & N. R. R. Co. v. Anchors, 114 Ala. 492.....	511
L. & N. R. R. Co. v. Brown, 121 Ala. 221.....	511
L. & N. R. R. Co. v. Campbell, 97 Ala. 147.....	559
L. & N. R. R. Co. v. Cofer, 110 Ala. 491.....	502

E. & N. R. R. Co. v. Davis, 103 Ala. 661.....	488
L. & N. R. R. Co. v. Duncan, 137 Ala. 454.....	502
L. & N. R. R. Co. v. Gray, 154 Ala. 156.....	502
L. & N. R. R. Co. v. Holland, 173 Ala. 156.....	462
L. & N. R. R. Co. v. Holland, 164 Ala. 73.....	490
L. & N. R. R. Co. v. Mitchell, 134 Ala. 261.....	511
L. & N. R. R. Co. v. Tanner, 60 Ala. 621.....	510
Lowe v. State, 134 Ala. 154.....	75
Lyon v. Bradley, 168 Ala. 505.....	407
Lyon v. State, 61 Ala. 229.....	75
McCrary v. Williams, 127 Ala. 251.....	173
McDaniel v. Moody, 3 Stew. 314.....	292
McDaniel v. T. C., I. & R. R. Co., 153 Ala. 493.....	607
McGehee v. State, 4 Ala. App. 54.....	482
McKenzie v. Matthews, 153 Ala. 437.....	325
McMichael v. Craig, 105 Ala. 382.....	159
McNamara v. Logan, 100 Ala. 194.....	501
McQueen v. Lampley, 74 Ala. 408.....	616
McQueen v. Turner, 91 Ala. 273.....	249
McVay v. State, 100 Ala. 110.....	469
Madden v. Floyd, 69 Ala. 221.....	610
Maddox v. State, 159 Ala. 53.....	78
Magnetic O. Co. v. Marbury L. Co., 104 Ala. 465.....	356
Martin v. State, 89 Ala. 115.....	58
Martin v. U. S. & N. R. R. Co., 163 Ala. 215.....	511
Martinez v. Meyers, 167 Ala. 456.....	294
Mary Lee Co. v. Chambliss, 97 Ala. 171.....	558, 559
Mathis v. State, 3 Ala. App. 7.....	11
Matthews v. McDade, 72 Ala. 377.....	157
Maxwell v. State, 89 Ala. 165.....	472
Mayor & Ald., etc. v. Allaire, 14 Ala. 400.....	656
Merritt v. Coffin, 152 Ala. 474.....	182
Merriweather v. Sayre Min. Co., 161 Ala. 441.....	509
Meyers v. Martinez, 162 Ala. 562.....	294
Meyers v. Martinez, 172 Ala. 641.....	294
Miller v. Griffin, 102 Ala. 613.....	216
Miller v. Marx, 55 Ala. 322.....	651
Minge v. Green, 176 Ala. 343.....	181
Mitchell v. State, 129 Ala. 23.....	522
Mizell v. State, ex rel., 173 Ala. 437.....	668
Mizell v. So. Ry. Co., 132 Ala. 504.....	507
Mobile v. L. & N. R. R. Co., 84 Ala. 115.....	318
Monroe v. Arthur, 126 Ala. 362.....	353
Montgomery v. Henry, 144 Ala. 629.....	668
Montgomery v. L. & N. R. R. Co., 84 Ala. 127.....	318
Montgomery & E. R. R. Co. v. Mallette, 92 Ala. 209.....	486
Montgomery & E. R. R. Co. v. Perryman, 91 Ala. 413.....	488
Montgomery St. Ry. Co. v. Smith, 146 Ala. 316.....	574
Moore v. N. C. & St. L. Ry., 137 Ala. 495.....	78
Moore v. Johnson, 87 Ala. 220.....	333
Morgan v. Flexner, 105 Ala. 356.....	496
Morris v. Bank of Attalla, 153 Ala. 352.....	353
Morris v. Montgomery Traction Co., 143 Ala. 246.....	131
Morris Hotel Co. v. Henley, 145 Ala. 678.....	401
Morton v. Allen, 180 Ala. 279.....	305
Motes v. Carter, 73 Ala. 553.....	207

ALABAMA CASES CITED.

xvii

Nashville, C. & St. L. Ry. v. Hammond, 104 Ala. 191.....	294
National B. & L. Assn. v. Cunningham, 130 Ala. 539.....	353
Nelson v. Wadsworth, 171 Ala. 603.....	305, 365
Nimlinger v. Norwood, 72 Ala. 277.....	215
Noles v. State, 26 Ala. 31.....	47, 48
O'Brien v. State, 91 Ala. 27.....	75
Odom v. State, 174 Ala. 4.....	80
Oliver v. State, 17 Ala. 587.....	48
Old Dominion T. Co. v. Powers, 140 Ala. 220.....	318, 319
O'Neal v. McKenna, 116 Ala. 606.....	413
Palmer v. Sims, 170 Ala. 59.....	160
Parker v. Parker, 93 Ala. 80.....	333
Parks v. State, ex rel., 100 Ala. 634.....	608
Perkins v. Corbin, 45 Ala. 118.....	603
Perry v. N. O. M. & C. R. R. Co., 55 Ala. 413.....	128, 129
Perry Co. v. R. R. Co., 58 Ala. 556.....	193, 200
Petty v. Booth, 19 Ala. 633.....	357
Pettus v. McKinney, 74 Ala. 108.....	230
Phillips v. Bradshaw, 107 Ala. 199.....	545
Pickens v. State, 115 Ala. 42.....	521, 522
Pitts v. State, 140 Ala. 70.....	94
Pollak v. Winters, 173 Ala. 550.....	342
Polly v. McCall, 37 Ala. 20.....	500
Pool v. Devers, 30 Ala. 672.....	415, 416
Pope v. State, 168 Ala. 33.....	20
Pope v. State, 174 Ala. 63.....	20, 21
Pope v. Welsh, 18 Ala. 631.....	417
Price v. State, 117 Ala. 113.....	7
Prichett v. State, 22 Ala. 39.....	48
Prowell v. State, 142 Ala. 80.....	645
Ragsdale v. State, 134 Ala. 31.....	76
Randolph v. Valls, 180 Ala. 82.....	168
Rawles v. Kennedy, 23 Ala. 252.....	190
Rayford v. State, 7 Port. 104.....	508
Reiter-C. M. Co. v. Hamlin, 144 Ala. 192.....	507
Reeves v. Abercromble, 108 Ala. 535.....	365
Roberts v. State, 68 Ala. 156.....	33
Robinson v. Drummond, 24 Ala. 174.....	415, 416
Rodgers v. Brooks, 99 Ala. 34.....	539
Rodgers v. State, 144 Ala. 34.....	50
Roebuck v. Duprey, 2 Ala. 535.....	333
Rogers v. Prattville M. Co., 81 Ala. 487.....	291
Rosenau v. Powell, 173 Ala. 123.....	214
Rothschilds v. Bay City L. Co., 139 Ala. 571.....	358
Sanders v. State, 2 Ala. App. 13.....	26
Savannah & M. R. R. Co. v. Buford, 106 Ala. 303.....	502
Seaboard M. Co. v. Woodson, 94 Ala. 143.....	558
Seay v. McCormick, 68 Ala. 549.....	357
Sellers v. Grace, 150 Ala. 181.....	353
Schefferlin v. Schefferlin, 127 Ala. 35.....	400
Schuler v. Fischer, 167 Ala. 184.....	414
Scott v. Land Co., 127 Ala. 165.....	230
Scott v. Simmons, 70 Ala. 352.....	187, 207
Shackelford v. Kiser Co., 131 Ala. 224.....	255

Sharp v. Orme, 61 Ala. 263.....	610
Shelton v. State, 144 Ala. 106.....	83
Shines v. Steiner, 76 Ala. 458.....	342
Shook v. Pate, 50 Ala. 91.....	77
Shorter v. Shepherd, 33 Ala. 648.....	302
Simmerman v. Hill Creek Co., 170 Ala. 553.....	509
Singo v. Brainard, 173 Ala. 64.....	287
Sloan v. Gulce, 77 Ala. 394.....	271
Sloss-S. S. & I. Co. v. Lollar, 170 Ala. 239.....	610, 611
Sloss-S. S. & I. Co. v. Mitchell, 161 Ala. 278.....	581, 584
Sloss-S. S. & I. Co. v. Mitchell, 167 Ala. 226.....	581, 583
Sloss-S. S. & I. Co. v. Mitchell, 181 Ala. 576.....	671
Sloss-S. S. & I. Co. v. Sharp, 156 Ala. 288.....	506
Smith v. Conner, 65 Ala. 371.....	270
Smith v. State, 139 Ala. 115.....	194, 196
Smith v. State, 142 Ala. 22.....	76
Smoot v. M. & M. R. R. Co., 67 Ala. 13.....	559
Snodgrass v. Caldwell, 90 Ala. 319.....	342
Sorrell v. Craig, 9 Ala. 534.....	56
So. Ry. v. Bonner, 141 Ala. 517.....	469
So. Ry. v. Bunt, 131 Ala. 591.....	502, 503
So. Ry. v. Carter, 164 Ala. 110.....	574
So. Ry. v. Leard, 146 Ala. 349.....	586
So. Ry. v. Lollar, 135 Ala. 375.....	509
So. Ry. v. Penny, 164 Ala. 188.....	487, 490
So. Ry. v. Shelton, 136 Ala. 191.....	503
So. Ry. v. Smith, 163 Ala. 174.....	487, 490
So. St. F. & C. Co. v. Brannan, 178 Ala. 115.....	296
So. St. F. & C. Co. v. Tanner, 180 Ala. 30.....	296
So. St. F. & C. Co. v. Wilmer S. Co., 180 Ala. 1.....	296
Spyker v. Snencer, 8 Ala. 333.....	390
State v. McCall, 4 Ala. 643.....	82
State ex rel. Atty. Gen. v. Savage, 89 Ala. 1.....	446
State ex rel. Crumpton v. Montgomery, 177 Ala. 212.....	386
State ex rel. Crenshaw v. Joseph, 175 Ala. 579.....	604
State ex rel. v. Skeggs, 154 Ala. 249.....	106
State ex rel. v. Mobile, 24 Ala. 701.....	659, 664
State ex rel. v. McGough, 118 Ala. 159.....	192, 196, 205
State ex rel. Winter v. Sayre, 118 Ala. 1.....	603
Steele v. Adams, 21 Ala. 540.....	216
Stewart v. So. Ry., 179 Ala. 304.....	511
Stewart v. Tucker, 106 Ala. 321.....	539
Steiner v. Berney, 130 Ala. 289.....	113
Story v. State, 71 Ala. 330.....	32, 35
Strauss v. Harrison, 79 Ala. 324.....	207
Street v. Nelson, 80 Ala. 230.....	539
Stringfellow v. Ivie, 73 Ala. 209.....	290
Suell v. Derricot, 161 Ala. 268.....	34, 46
Sullivan v. L. & N. R. R. Co., 138 Ala. 650.....	360
Sweet v. B. R. L. & P. Co., 136 Ala. 166.....	529
Talladega Bank v. Brown, 128 Ala. 551.....	113
Tarver v. Haines, 55 Ala. 503.....	271
Taylor v. State, 149 Ala. 32.....	18
T. C. I. & R. R. Co. v. Hamilton, 100 Ala. 261.....	589
T. C. I. & R. R. Co. v. Linn, 123 Ala. 112.....	537
Tinney v. C. of Ga. Ry., 129 Ala. 523.....	503
Thacker v. Morris, 166 Ala. 401.....	827

ALABAMA CASES CITED.

xix

Thomas v. Bellamy, 126 Ala. 253.....	500
Thomason v. Gray, 82 Ala. 291.....	482
Thompson v. N. C. & St. L. Ry., 160 Ala. 590.....	236
Thornton v. State, 4 Ala. App. 205.....	11
Tombigbee Co. v. Faircloth Co., 155 Ala. 575.....	182
Toole v. State, 170 Ala. 41.....	99
Town of Cuba v. Miss. C. O. Co., 150 Ala. 259.....	318
Troy v. Smith, 33 Ala. 469.....	327
Troy Fert. Co. v. Logan, 90 Ala. 325.....	562
Turner v. McFee, 61 Ala. 468.....	216
Turner v. State, 160 Ala. 40.....	31
Tuscaloosa B. Co. v. Olmstead, 41 Ala. 9.....	193, 199
Tyler v. Jewett, 82 Ala. 93.....	229, 230
Vandegrift v. So. Min. L. Co., 166 Ala. 312.....	278
Vincent v. Walker, 86 Ala. 336.....	305
Walker v. State, 117 Ala. 85.....	49, 50
Walker v. State, 91 Ala. 80.....	56
Wallace v. Hodges, 160 Ala. 276.....	357
Warren v. Gabriel, 51 Ala. 235.....	400
Washington v. State, 53 Ala. 29.....	195
Watson v. State, 90 Ala. 41.....	469
Watts v. Gordon, 65 Ala. 546.....	229
Weaver v. Lapsley, 43 Ala. 224.....	193
Welner v. Stirling, 61 Ala. 98.....	274
Welborn v. State, 154 Ala. 79.....	75
Wes. Ry. of Ala. v. Ala. G. S. R. R. Co., 96 Ala. 272.....	129
Wes. Ry. of Ala. v. Capitol R. Co., 177 Ala. 149.....	386
W. U. T. Co. v. Seed, 115 Ala. 670.....	486
Whitley v. State, 144 Ala. 75.....	7
Whitten v. State, 15 Ala. 72.....	25
Wilkinson v. Lehman-Durr Co., 130 Ala. 403.....	636
Wilkinson v. Searcy, 76 Ala. 176.....	485
Wilkinson v. Stewart, 74 Ala. 198.....	249
Williams v. Armstrong, 130 Ala. 389.....	342
Williams v. L. & N. R. R. Co., 176 Ala. 631.....	8
Williams v. Vining, 150 Ala. 482.....	177
Wilson v. L. & N. R. R. Co., 85 Ala. 269.....	559
Winter v. City of Montgomery, 83 Ala. 589.....	572
Winter v. Powell, 180 Ala. 425.....	162
Wofford v. Meeks, 129 Ala. 349.....	444, 445
Woodbury v. State, 69 Ala. 245.....	471
Wood v. Matthews, 53 Ala. 1.....	156
Wood v. Pittman, 113 Ala. 207.....	55
Woods v. State, 76 Ala. 35.....	55
Woodward v. State, 5 Ala. Ann. 202.....	98
Wynn v. McCraney, 156 Ala. 633.....	436
Wynn v. Tallapoosa Bank, 168 Ala. 469.....	382
Yates v. Adams, 119 Ala. 247.....	113
Zimmerman Mfg. Co. v. Daffin, 149 Ala. 380.....	357, 358

CASES

IN THE

SUPREME COURT OF ALABAMA

NOVEMBER TERM 1912-13.

Aaron v. The State.

Murder.

(Decided April 23, 1913. Rehearing denied May 8, 1913.
61 South. 812.)

1. *Homicide; Evidence.*—In a prosecution for murder, a statement by deceased made while deceased was lying on the floor after having been shot, made in the presence of defendant, accusing defendant of having shot her, was admissible.

2. *Evidence; Confessions.*—A voluntary confession by defendant that he purposely shot deceased, his wife, was admissible.

3. *New Trial; Criminal Case; Discretion.*—In criminal cases motions for new trials because of newly discovered evidence are addressed to the sound discretion of the trial court, and the court's action thereon is not revisable on appeal.

APPEAL from Hale Law and Equity Court.

Heard before Hon. CHARLES E. WALLER.

Sharp Aaron was convicted of murder in the first degree, was sentenced to death, and he appeals. Affirmed.

While Shed Shears was testifying, and after describing the condition surrounding the homicide, he testified that he opened the door leading into the room where the shooting occurred, and that as he did so the form of the woman shot fell against him and onto the floor, and that at the time the defendant was present looking over his shoulder. The witness was then permitted to

[Aaron v. The State.]

testify that he asked the wounded woman if Sharp shot her, and that she replied, "Yes, sir," and that he asked her, further, if Sharp killed her, and if he intended to kill her, and if he did it purposely, and her reply was in the affirmative to each question. Witness was further permitted to testify that he looked at the defendant and said to him, "You have surely killed this girl," and he replied, "I have not done any such thing." Whereupon witness says to him, "She says you have done it," to which defendant made no reply, but went immediately out in his night clothes, and that he did not see defendant any more until the officers had him.

JOE H. JAMES, for appellant. The statement of the deceased made after the shooting was not offered as a dying declaration, and was not of the *res gestae*, and consequently was not admissible.—*Lundsford v. State*, 56 South. 89; *Hill v. State*, 156 Ala. 3; *Pitts v. State*, 140 Ala. 70; *Nelson v. State*, 130 Ala. 83. It does not appear affirmatively that defendant could have heard the statement.—*Davis v. State*, 131 Ala. 10; 12 Cyc. 421.

R. C. BRICKELL, Attorney General, and W. L. MARTIN, Assistant Attorney General, for the State. The defendant did not deny killing deceased, and the evidence objected to was relevant to show his attitude, and also to show that he did not enter a denial.

DOWDELL, C. J.—The defendant was tried and convicted on an indictment for murder in the first degree and sentenced to death. From the judgment of conviction and sentence the present appeal is prosecuted.

No question is presented on the record, in the proceedings leading up to the trial in the court below. A careful examination by us fails to disclose any error or

[Aaron v. The State.]

irregularity in the record proper, and everything appears in conformity with the requirements of the law in such cases.

The only question presented for our consideration, and complained of as error, arises on the rulings of the court in the admission of evidence.

The objections of the defendant to the testimony of the witness, Shed Shears, as shown on pages 7, 8, and 9 of the record, were wholly without merit. The statements of the deceased testified to by this witness were made by the deceased while lying upon the floor, after she had been shot, and in the presence of the defendant. That this evidence was relevant and competent we think there can be no doubt, and hence there could be no predicate for errors on the rulings of the court in the admission of the same.

The confession of the defendant that he purposely shot his wife, the deceased, was shown to have been voluntarily made, and consequently no error was committed in the admission of this evidence.

There is one other question which hardly need be noticed, and that is the overruling of the motion for a new trial. The motion for a new trial was based on newly discovered evidence. In criminal cases motions for new trial are addressed to the discretion of the trial court, and are not reversible on appeal.

We fail to find any error in the record, and it follows that the judgment appealed from must be affirmed.

Affirmed. All the Justices concur.

[Ex Parte State.]

Ex Parte State

Murder.

(Decided November 19, 1912. Rehearing denied December 17, 1912.
61 South. 53.)

1. *Homicide; Evidence; Declarations of Accused.*—Declarations of a defendant prior to a homicide expressive of ill will or menace against a decedent, are admissible in evidence against defendant; such evidence differs from confessions and inculpatory statements made after the commission of the offense, and being declarations against interest, are admissible without laying a predicate by first interrogating the party as to whether he had made such declarations.

2. *Evidence; Predicate; Presumption.*—Where the only defect in a predicate for the contradiction of a witness was the failure of the record to show that a particular time and place was fixed for the conversation as subsequently proved by the impeaching witness, and where the questions to the witness are not set out, and there is nothing in his denial to negative the fact that the time and place were fixed when he was questioned as to his conversation, the appellate court will presume that the time and place were embraced in such questions.

3. *Appeal and Error; Showing Error; Burden; Presumption.*—It is incumbent upon appellant to affirmatively show error, and this rule applies to a predicate for the admission of evidence, as well as to other questions, the presumption being that the trial court did its duty, and required a proper predicate to be laid, if one was necessary.

4. *Courts; Supervising Appeals; Questions of Fact.*—The Supreme Court may review and revise a decision of the Court of Appeals upon questions of jurisdiction and law, but it will not review the findings or conclusions on the facts, or review the facts for the purpose of revising its application of the law thereto.

CERTIORARI to Court of Appeals.

Morris Livingston was convicted of homicide, and on appeal to the Court of Appeals, the judgment of the trial court was reversed. Whereupon the State applies for a writ of certiorari to review the opinion rendered by the Court of Appeals, and reported in the case of *Livingston v. State*, 7 Ala. App. 43; 61 South. 54. Writ awarded, and the judgment of the Court of Appeals reversed and the cause remanded.

[Ex Parte State.]

R. C. BRICKELL, Attorney General, W. L. MARTIN, Assistant Attorney General, and W. B. OLIVER, for the State. The character of the evidence sought was merely an inculpatory admission of defendant made before the killing, and evincing ill will or menace towards defendant, and may be shown independent of a predicate.—*Shelton v. State*, 144 Ala. 11. The objection was general, and did not direct the attention of the court to the want of a predicate as the basis for the objection.—*Nelson v. Iverson*, 29 Ala. 9; *Steiner v. Trainum*, 98 Ala. 315; 51 Vt. 577; 115 U. S. 77; Jones on Evid., sec. 893. It is an elementary principle that error must be affirmatively shown, and that every reasonable presumption will be indulged to support the action of the trial court, it being always presumed that the court will do its duty in the premises.

WALTER NESMITH, J. C. MILNER, and KIRK, CARMICHAEL & RATHER, for appellee. A predicate for the impeachment of a witness must be properly laid.—*Floyd v. State*, 82 Ala. 16; *Sanders v. State*, 105 Ala. 4; *Southern v. State*, 118 Ala. 88. The bill of exceptions must show that a proper predicate was laid and no presumption will be indulged that it was laid.—*So. H. & S. Co. v. Standard E. Co.*, 165 Ala. 582; *Bolton v. Cuthbert*, 132 Ala. 406; *Sherrill v. L. & N.*, 148 Ala. 1; *Excelsior L. Co. v. Lomax*, 166 Ala. 612. This court will not review the findings of the appellate court on the facts, further than to ascertain if the law was correctly applied thereto.

ANDERSON, J.—This case was reversed by the Court of Appeals upon two propositions only: The first, because no sufficient predicate was laid for the admission of the testimony of J. M. Baker as to a statement made

[Ex Parte State.]

to him by the defendant's witness Hollis; second, because J. G. Cobb was permitted to testify as to a statement made to him by the defendant with reference to the deceased prior to the killing, and no predicate was laid. We will discuss the questions in inverse order for convenience.

Declarations of a defendant prior to the commission of the alleged offense, expressing menace or ill will against the person assaulted or injured, are admissible in evidence against him.—1 Mayfield's Dig., pp. 262, 263, and cases cited. This is a different kind of evidence from confessions and inculpatory statements after the commission of the offense, which must be voluntary, but is within the class of declarations against interest, and which are admissible against parties to a cause, civil or criminal, without laying a predicate by first interrogating the party as to whether or not he made same. Ordinary rules do not apply to parties to a cause; their statements are admissions or declarations, and is independent testimony, and no foundation is necessary for the introduction of same.—Jones on Evidence, § 851. To hold that a predicate must be laid by first asking the party if he made such statements would deny the opposite party the benefit of most material evidence, if the party making the statements did not see fit to testify as a witness. The Court of Appeals erred upon a question of law in holding that the evidence of J. G. Cobb that he heard the defendant at Kennedy, on the day of the trouble between defendant and Gunter, at the store say "he could get something to eat besides at the Gunter Hotel and * * * he would see Gunter later," was not admissible as evidence because no sufficient predicate had been laid when the defendant was on the stand. It is true it would have been more orderly for the state to have introduced this

[Ex Parte State.]

statement direct, instead of in rebuttal, but this was a mere irregularity in the order of introducing evidence. It is also true that counsel for the state undertook the useless burden of laying a predicate for this declaration of the defendant, but, whether properly laid or not, the admission of said statement was not reversible error.

Upon appeal it is incumbent upon the appellant to affirmatively show error, and this rule applies to predicates as well as other questions, as the presumption is that the trial court did its duty, and that a predicate was laid, when required, unless it affirmatively appears that it was not properly established.—*Price v. State*, 117 Ala. 113, 23 South. 691; *Whatley v. State*, 144 Ala. 75, 39 South. 1014; *Gilmore v. State*, 126 Ala. 20, 28 South. 595. It seems that the only defect with the predicate for the contradiction of the witness Hollis by J. M. Baker was the failure of the record to show that a particular time and place was fixed for the conversation, as subsequently proved by J. M. Baker, and which was substantially the same as the one denied by Hollis, though no time and place was fixed in the reply of Hollis. The questions to Hollis are not set out, and there is nothing in his denial to negative the fact that the time and place was not fixed when he was interrogated as to the conversation with J. M. Baker, and, the appellant not affirmatively showing that the time and place was not fixed, the appellate court could presume that it was embraced in the question to the witness. It may be that the bill of exceptions purports to set out all of the evidence, but it does not purport to set out the questions, and a presumption that the question fixed the time and place is compatible with the record. This is a question, however, of fact or of an application of the facts in the case to the law, and does not involve

[Ex Parte State.]

such an error of law as would authorize a review of the said ruling by this court by certiorari. We have previously held that this court had the authority to review and revise the decisions of the Court of Appeals upon questions of jurisdiction and law.—*Williams v. L. & N. R. R. Co.*, 176 Ala. 631, 58 South. 315. We held, however, in the case of *Ex parte Stevenson*, 177 Ala. 384, 58 South. 992, that this court would not review or revise the finding or conclusion of the Court of Appeals upon the facts, or that we would review the facts for the purpose of revising the application of same to the law by said Court of Appeals.

In the case of *Ex parte Dickens*, 162 Ala. 276, 50 South. 219, this court, in discussing its revisory powers over inferior courts, in the absence of a statutory right of appeal, said through SIMPSON, J., “By the common law the power is vested in the Supreme Court to review the orders, proceedings, and judgments of all inferior courts and tribunals, and pass upon the question of their jurisdiction and decisions on questions of law; but, in the absence of some statute conferring the power of reviewing the determinations of these inferior tribunals upon questions of fact, the action of the court or tribunal is final and conclusive, and cannot be reviewed, revised, or corrected on the common-law writ of certiorari.”—Harris on Certiorari, p. 40, § 45. Originally, on certiorari, only the questions of jurisdiction was inquired into; but this limit has been removed, and now the court ‘examines the law questions involved in the case which may affect its merits.’—*Id.*, p. 3, § 1. As a general proposition, certiorari will not be granted in cases where the party seeking it has an adequate remedy by appeal.—Harris on Certiorari, p. 37, § 44; *A. G. S. R. R. Co. v. Christian*, 82 Ala. 307, 309, 1 South. 121.”

For the error of law above suggested the writ of cer-

[Jones v. The State.]

tiorari is awarded, the judgment of the Court of Appeals is reversed, and the cause is remanded to said court for further consideration.

Certiorari to Court of Appeals awarded, and judgment of said Court of Appeals is reversed, and the cause is remanded. All the Justices concur, except DOWDELL, C. J., not sitting.

Jones v. The State.

Murder.

(Decided February 6, 1913. 61 South. 334.)

Indictment and Information; Objection to; Mode.—Since the enactment of the jury law, Acts 1909, p. 305, objections to indictments on any ground going to the formation of the grand jury which returned them can be taken in no other way than by plea in abatement, and not then except on the ground that the grand jurors were not drawn by the officers designated by law to draw them.

APPEAL from Jefferson Criminal Court.

Heard before Hon. M. FRANK CAHALAN.

Arthur Jones was convicted of murder and he appeals. Affirmed.

C. D. COMSTOCK, for appellant. The indictment should have been quashed on motion of defendant.—Acts 1909, p. 305. The defendant was arraigned before one of the judges of the Criminal Court, and tried and sentenced by another judge of such court at the same term, each of whom were acting separately, and operates as a discontinuance.

R. C. BRICKELL, Attorney General, and W. L. MARTIN, Assistant Attorney General, and BORDEN H. BURR, for the state. The defendant's objection to the indict-

[Jones v. The State.]

ment was not taken in the proper way.—Acts 1909, p. 315, sec. 23; *Mathes v. State*, 3 Ala. App. 7; *Collins v. State*, 3 Ala. App. 64; *Thornton v. State*, 59 South. 234. There was no evidence to support the objections to the indictment and no exception to the court's ruling, and hence it cannot be reviewed.—*Garrett v. State*, 97 Ala. 18; *Jordan v. State*, 165 Ala. 114; *Kimball v. State*, 165 Ala. 118.

McCLELLAN, J.—The appellant was adjudged guilty of murder in the first degree, and sentenced to suffer death. When brought before the court to be arraigned, he presented to the court a paper thus captioned: "Comes the defendant, Arthur Jones, and objects and protests against being arraigned in this cause and to answer said indictment. * * *" The "reasons and grounds" assigned therefor were these: That the grand jury was illegally drawn; that said grand jury was not drawn as is required by law; that a number of the grand jury were not qualified to serve on said jury as is required by law; and that defendant had not been served with a list of the venire to try him, nor had he had notice of the drawing thereof. The objections were as general as our statement of them indicates.

The record proper affirmatively shows that the defendant was present, in open court, during all of the proceedings in the cause, and at all stages thereof, and also that a copy of the venire for his trial and a copy of the indictment were served on the defendant four days before the day for which his trial was set. The bill of exceptions, in which his objection and protest is set forth, contains no evidence, of any character, reflecting upon the truth of the facts the record, in this connection, recites. Since the Jury Law of 1909 has been in effect, objections to indictments on any ground going

[German v. The State.]

to the formation of the grand jury can only be taken by plea in abatement, and no objection can be taken by that character of pleading, except on the ground that the grand jurors who found the indictment were not drawn by the officer designated by law to draw the same.—Acts Sp. Sess. 1909, pp. 305-316; *Thornton v. State*, 4 Ala. App. 205, 59 South. 234; *Mathes v. State*, 3 Ala. App. 7, 12, 57 South. 390; *Collins v. State*, 3 Ala. App. 64, 67, 58 South. 80. Section 23 of that act (page 315) reads: "That no objection to an indictment on any ground going to the formation of the grand jury which found the same can be taken to the indictment, except by plea in abatement to the indictment; and no objection can be taken to an indictment by plea in abatement except upon the ground that the grand jurors who found the indictment were not drawn by the officer designated by law to draw the same."

No error appearing, the judgment is affirmed.

Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

German v. The State.

Murder.

(Decided February 13, 1913. 61 South. 326.)

1. *Homicide Evidence; Jury Question.*—Where the evidence was conflicting as to whether the killing was a continuance of an earlier difficulty, or a separate transaction, that question was properly submitted to the jury, for if the earlier quarrel was a part of the main transaction all the circumstances surrounding it were admissible, and if not, then only the fact of the difficulty was admissible, and not the details.

2. *Evidence; Declaration of Accused.*—Evidence of declarations in his own behalf made by one accused of homicide is not admissible, unless of the *res gestæ* of the transaction.

[German v. The State.]

APPEAL from Montgomery City Court.

Heard before Hon. ARMSTEAD BROWN.

Coleman German was convicted of murder and he appeals. Affirmed.

JAMES S. PARRISH, and WALTER S. RICHARDSON, for appellant. Evidence of a difficulty with a third person in which deceased was in no wise connected, was not admissible.—21 Cyc. 896; 6 Enc. of Evid. Under these authorities the court erred in admitting the evidence of the witness Pickett, as to the quarrel between defendant and his wife, as it was in no way connected with the killing.

R. C. BRICKELL, Attorney General, and W. L. MARTAN, Assistant Attorney General, for the State. The objections to the testimony of Pickett came too late, as they were not made until after the witness had answered.—*McAlmon v. State*, 96 Ala. 98; *Billingslea v. State*, 96 Ala. 126; *Ellis v. State*, 105 Ala. 72; *Downey v. State*, 115 Ala. 108; *Stowers F. Co. v. Brake*, 158 Ala. 639. The evidence was relevant to show the purpose of the defendant in returning to the house.

MAYFIELD, J.—So far as the record proper shows, the accused was properly indicted, tried, convicted, and sentenced to death for the murder of Pet Robinson. The bill of exceptions shows without dispute that deceased was a woman, and a sister-in-law to the defendant, and that he killed her at his own house by shooting her with a pistol. The killing with a deadly weapon is admitted. The defense was that the killing was accidental.

It appears that a dispute and quarrel arose between the defendant, on the one side, and his wife and the

[German v. The State.]

deceased, on the other, shortly before the killing; that the defendant was drinking, and was carried away from the house to the well, a short distance therefrom, by mutual friends of the parties; and that a knife was taken from the defendant as he was carried away. The evidence was conflicting as to whether the defendant had been reconciled toward his wife and the deceased before he returned to the house and renewed the difficulty. The evidence was also conflicting as to how long defendant remained away from the house, and as to whether the former difficulty was renewed on the defendant's return to the house, or whether the fatal transaction was a separate and independent occurrence, unconnected with the first or former difficulty.

Under this condition of the evidence, there was no error in the trial court's submitting these disputed questions to the jury. If the two occurrences or quarrels were parts of the same difficulty, the details of both were admissible in evidence; if they were not such, but were separate and distinct difficulties, then the details of the first were not admissible in evidence, but only the evidence of the fact of such difficulty, to show motive or malice. For this reason, there was no error in the trial court's submitting this question, whether the two occurrences were parts of the same difficulty or transaction, to the jury.

The trial court very properly declined to allow the defendant to prove his own statements or declarations made after the killing. They were clearly not parts of the *res gestae*, and at best were merely self-serving declarations or statements. They were not parts of other conversations proven by the state.

The main charge of the court is not set out in the bill of exceptions, but the bill recites that counsel for the state and counsel for the accused were both satisfied

[Reid v. The State.]

therewith. The bill also shows that the court gave, at the request of the accused, many charges which stated the law accurately and fairly as applied to the evidence in this case. In fact, the law was fully and fairly charged in the language requested by the able counsel for the accused.

We have searched the record, as the statute requires us to do, for errors, but find none, and the case must be affirmed.

Affirmed. All the Justices concur.

Reid v. The State.

Murder.

(Decided February 6, 1913. 61 South. 324.)

1. *Evidence; Opinion; Nature of Wound.*—Expert knowledge not being necessary to justify one in testifying as to the range of wounds, it was competent for one who saw deceased immediately after he was shot, and who examined the wound, to testify that the large wound on the right of decedent's spinal column went straight in, and the small wound on the edge of the shoulder blade ranged upward and stopped at the point of his shoulder, and that the wound on the left of his spinal column ranged to the left and stopped at the point of the hip.

2. *Homicide; Instructions; Self-Defense.*—A charge asserting that if the situation when accused arrived was such as to impress the mind of a reasonable man that his wife was in danger of losing her life, or of suffering great bodily harm at the hands of decedent, and accused was free from fault in bringing on the difficulty between his wife and the decedent, the jury should acquit, omitted defendant's bona fide belief that his wife was in great danger, as a condition to killing for her protection, and was consequently properly refused.

3. *Charge of Court; Assuming Facts.*—A charge assuming that defendant had a good character was properly refused as that was a question for the jury under the evidence, notwithstanding there was no conflict.

4. *Same; Weight of Evidence.*—Charges which lay undue emphasis or call particular attention to parts of the evidence, are properly refused.

(Anderson, J., dissents in part.)

[Reid v. The State.]

APPEAL from Lee County Law and Equity Court.

Heard before Hon. LUM DUKE.

Bartow Reid was convicted of murder, and he appeals. Affirmed.

The following charges were refused to defendant:

"(2) The defendant has proven without conflict in this case a good character. I charge you that you must consider this proof, and I charge you that you may consider it together with all the other evidence in the case, even to the generation of a reasonable doubt, that would authorize you to find the defendant not guilty."

"(4) I charge you, gentlemen, that, if you believe from all the evidence in this case that defendant's wife fired the pistol shot, it would make no difference how those pistol wounds were inflicted, if you believe from the evidence that the situation, at the time the defendant came on the scene, was such as to impress the mind of a reasonable man that defendant's wife was in danger of losing her life, or suffering great bodily harm at the hands of the deceased, at the time the fatal shot was fired, if you further believe from the evidence that defendant's wife was free from fault in bringing on the difficulty between her and deceased."

BARNES & DENSON, and THOMAS D. SANFORD, for appellant. The witness was not shown to be such an expert in gunshot wounds as to be qualified to testify as to the range of such wounds. Counsel discuss the charges refused with the insistence that their refusal was error to reversal, but cite no authority in support of their contention.

R. C. BRICKELL, Attorney General, and W. L. MARTIN, Assistant Attorney General, for the State.

[Reid v. The State.]

SAYRE, J.—Defendant was convicted of murder and sentenced to suffer death. At the trial he did not deny the killing, but sought to excuse himself on the ground that it had been done in defense of his wife. Apart from the parties, there were no eyewitnesses to the difficulty. Deceased had three wounds in the back, one large wound inflicted by a shotgun and two small ones made by shots from a pistol. One Wilson, a witness for the state, saw the body of deceased shortly after death, saw the wounds upon it, and testified that, in order to stop the flow of blood from the large wound, he had “stuffed about a pound and a half or two pounds of cotton in it.” The state asked this witness, “What was the range of the wounds on deceased’s body?” He answered, “That the large wound, on the right of deceased’s spinal column, went straight in; that the small wound, at the lower edge of deceased’s shoulder blade, ranged upward and stopped at the point of deceased’s shoulder; that the small wound, on the left of deceased’s spinal column, ranged to the left, and stopped at the point of deceased’s hip.” Timely objections were taken and exceptions reserved to the allowance of this testimony. The objections were that the witness had not been shown to be an expert on the subject of gunshot wounds; that it had not appeared that witness had any means of knowing the range of the wounds; and that his statement was a mere conclusion, without facts to support it. In the circumstances of the case shown by the evidence, it is impossible to say that this testimony did not touch upon a most material point. But it is equally impossible to affirm that the witness did not know whereof he spoke. No expert knowledge was necessary. If he observed the course or range of the wounds—and the necessary implication was that he did—he could state the fact. If the competency of his

[Reid v. The State.]

statement was doubted as not being the result of actual observation or as resting in debatable inference, the invalidating facts should have been developed by a cross-examination. On its face, the testimony was competent, and there was no error in the court's ruling.

The charge requested by defendant in reference to the proof of good character (charge 2) was clearly erroneous. It assumes that defendant had a good character, whereas that was a matter to be found by the jury, even though all the witnesses concurred in the statement that they knew defendant's general character in the community where he lived as a peaceable, law-abiding citizen, and that it was good. However phrased, this testimony could only have expressed the judgment or opinion of the witnesses. The true meaning of their testimony was that the witnesses thought there was in the community a general opinion concerning defendant, he had a reputation, which tended to prove his good character, or, it may be said, did prove it to the satisfaction of the witnesses. A community's estimate of a defendant's moral constitution may be greatly persuasive of his innocence; but the nature and evidence of the general estimate are such that the fact of its existence and its value, when proved, must be referred to the judgment of the jury, notwithstanding the unanimous expressions of witnesses.

Moreover, the charge, though it undertook in a way to have the jury bring into account all the evidence in the case, laid undue and misleading stress and emphasis upon the evidence of good character. It was refused without error.

Charge 4, requested by defendant, pretermitted defendant's bona fide belief that his wife was in great danger. Without such belief, he was not to be excused for taking the life of deceased, although the circum-

[Reid v. The State.]

stances were such as might have impressed the mind of a reasonable man with that belief. This has been frequently decided. The charge may be faulty in other respects.

Able counsel have had charge of defendant's case, and they have briefed no other point against the conviction. Nevertheless, the entire record has been examined. No error is found; and the judgment and sentence of the trial court must, so far as we are concerned, be executed.

Affirmed. All the Justices concur; except ANDERSON, J., who dissents on the question raised on charge 2. He therefore holds that the judgment should be reversed.

ANDERSON, J.—(dissenting in part).—To my mind the defendant's refused charge 2 asserts the law and speaks the truth. It has been often held reversible error to refuse identical charges, with the first portion omitted.—*Taylor v. State*, 149 Ala. 32, 42 South. 996. Therefore the only excuse for justifying the refusal of this charge is because of that part which instructs that defendant has "proved, without conflict, a good character." The defendant had the right to have the jury instructed as to the effect of his undisputed evidence. He not only introduced evidence of good character, but he proved a good character beyond dispute or controversy. If the court cannot be required to charge upon the effect of the undisputed evidence without invading the province of the jury in the present case, it is difficult to suppose a case wherein either side would be entitled to the general charge, or to one upon the effect of the evidence. The headnote 8, in the case of *Davis v. State*, 152 Ala. 25, 44 South. 561, is inaccurate, as the only charge to which it could relate was charge 22, which

[Pope v. The State.]

left it open to the jury as to whether or not defendant was a man of good character, but which was evidently condemned because it pretermitted considering the evidence of good character with the other evidence.

Charge 2 in the case of *Abrams v. State*, 155 Ala. 105, 46 South. 464, was condemned for other reasons than the fact that it assumed the result of the evidence of good character, whether believed or not. Neither the opinion or the report of this case states whether or not the proof of good character was disputed. Here the evidence was undisputed that the defendant bore a good character; and I think the point made against the charge is entirely too technical to deprive this defendant of the benefit of an instruction as to the effect of such a highly important feature of his defense. I think that the case should be reversed, and dissent from the holding of the majority.

Pope v. The State.

Murder.

(Decided February 6, 1913. 61 South. 263.)

Evidence; Opinion; Admissibility.—Where a witness had testified that certain peculiar tracks of a mule led from the scene of the murder to defendant's house, and that the feet of a mule belonging to defendant had certain peculiarities, and that he had examined the feet of a mule belonging to another person near whose house the murder was committed, and that they did not possess those peculiarities, it was error to permit the witness to state whether the mule belonging to such other person could have made the tracks described, as that was a question for the jury to determine from the evidence.

APPEAL from Anniston City Court.

Heard before Hon. THOMAS W. COLEMAN, JR.

Erwin Pope was convicted of murder in the first degree, and he appeals. Reversed and remanded.

[Pope v. The State.]

THOMAS J. HARRIS, for appellant. The court was in error in admitting the testimony that the John Body mule could not have made tracks similar to those found leading from the scene of the killing to the home of Erwin Pope.—*Pope v. State*, 57 South. 45, and authorities there cited.

R. C. BRICKELL, Attorney General, W. L. MARTIN, Assistant Attorney General, WILEY C. TUNSTALL, JR., Solicitor, and W. P. ACKER, for the State. The action of the court in reference to the evidence was free from error.—*Pope v. State*, 168 Ala. 42; *Littleton v. State*, 128 Ala. 31; 17 Cyc. 216, 218.

SOMERVILLE, J.—The appellant has been thrice tried, convicted, and sentenced to death, and the case is now before this court for the third time on appeal.—*Pope v. State*, 168 Ala. 33, 53 South. 292; s. c. 174 Ala. 63, 57 South. 245. One James McClurkin heard some one burglarizing his ginhouse during the night. He arose, dressed, and went in pursuit of the burglar, who had driven off in a wagon. He was not seen alive again, but his dead body was found close by the public road along which he had made pursuit, with his head battered and crushed, and the bloody stones and sticks used by the murderer lying close at hand. The murder occurred near the house of one John Body, and the theory of defendant was that Body was the real murderer. On the second appeal, after a very exhaustive consideration of the evidence, which was entirely circumstantial, we concluded that there was some evidence from which the jury might have inferred that Body was the murderer. A very important, if not the weightiest, part of the state's evidence, related to the identification of certain mule tracks leading from the scene of the

[Pope v. The State.]

murder to this defendant's house as the tracks of a mule owned and used by him. One Joe Dodgen, a blacksmith of 15 years' experience, had testified that he had traced these tracks to defendant's house; that these tracks were peculiar, in that those made by the hind feet showed no shoes, a piece of the left foot being broken off the side so that the sand "would oval up in the track," and the right foot leaving the impression of three nails on the earth; that he had examined the feet of a certain mule belonging to defendant and found its front feet shod, and the hind feet bare; and that the left hind foot had a piece broken out of the side, the same side as shown by the track, and the right hind foot had two loose nails in it. The witness also testified that he had examined the feet of John Body's mule, and that they were smooth, not broken on the bottom, and without nails.

There is no material difference between the evidence presented now and on the former trial. On this trial, against defendant's objection that the question called for the conclusion of the witness, the trial court allowed the state to ask the witness Dodgen, "Could the John Body mule have made the tracks that you tracked from the peach tree around the route that you described?" The witness answered, "No," and defendant's motion to exclude the answer, for the same reason, was overruled.

This same question was directly presented on the second appeal, and we distinctly ruled that the allowance of such a question was "manifest error" under the former decisions of this court, which we there reviewed, and the judgment of conviction was reversed solely on that proposition.—*Pope v. State*, 174 Ala. 63, 57 South. 245, 250. Those decisions hold that in such cases as this the witness must state the facts, and *leave to*

[Pope v. The State.]

the jury the conclusion sought to be elicited; and they clearly forbid the statement of the witness' conclusion, whether with or without a statement of the facts upon which it is founded.—*Busby v. State*, 77 Ala. 68; *Hodge v. State*, 97 Ala. 37, 12 South. 164, 38 Am. St. Rep. 145.

It is obvious that the description and identification or differentiation of these mule feet and tracks required no expert knowledge or skill, and the jury were quite as competent to draw the ultimate conclusion as was the blacksmith himself.

It is now urged in behalf of the trial court's departure from the ruling above stated, that on the first appeal this same trial ruling was exhibited, and, though not specifically treated in the opinion, it was inferentially held to be without merit by a general declaration that all points disclosed by the record had been considered, and that there was no error—excepting, of course, as to the point of reversal, which was foreign to this question.

We have examined the record of the first appeal, and a rigid scrutiny of Dodgen's testimony shows nothing on this subject other than the statement, "I found John Body's mule's hind feet to be sloped, so that they wouldn't make a track *like* the one I tracked." No objection was made to this by defendant, and, indeed, on the second appeal, a majority of the court held that the admission of such an opinion, accompanied by a statement of the facts, was not reversible error. The present question was in no way presented.

For the error pointed out, the judgment must be reversed, and the cause remanded for another trial.

Reversed and remanded. All the Justices concur.

[Gilmer v. The State.]

Gilmer v. The State.*Murder.*

(Decided February 13, 1913. 61 South. 377.)

1. *Homicide; Defenses; Drunkenness.*—Unless the intoxication has resulted in the actual insanity of defendant, and for that reason has rendered him mentally incapable of committing a crime, or unless his drunken condition at the time the act was committed was such as to render him incapable of entertaining the specific intent which forms an essential element of the crime of murder, voluntary drunkenness is not a defense to a prosecution for murder.

2. *Same; Dying Declarations.*—Whether or not dying declarations are competent, is for the exclusive determination of the trial court, but their credibility and weight is for the jury.

3. *Same; Fear of Death.*—It is not essential to the admission of a dying declaration that deceased in so many words expressed a conviction that she was in extremis, that death was impending, and that she was without hope of life, it being sufficient that surrounding circumstances indicate that at the time the declaration was made, deceased was in extremis, believed death to be imminent, and entertained no hope of life.

4. *Same; Punishment; Jury's Province.*—It is the duty of the jury on finding a verdict of guilt of murder in the first degree to determine whether or not the defendant shall be punished capitally.

5. *Evidence; Confessions.*—Although confessions made by a defendant to an officer having him in charge should be received with caution, they are nevertheless admissible if it appears that they were made freely and voluntarily.

6. *Appeal and Error; Harmless Error; Evidence.*—Where a matter was admitted, a defendant was not prejudiced by being required to answer questions on cross-examinations concerning such matter.

7. *Witnesses; Examination and Cross; Defendant.*—Where a defendant as a witness for himself testified that he drank heavily on the afternoon of the killing, and was drunk when the homicide occurred, he could be properly asked on the cross why he drank so heavily that afternoon.

APPEAL from Montgomery City Court.

Heard before Hon. ARMSTEAD BROWN.

Arnold Gilmer, alias, etc., was convicted of murder and he appeals. Affirmed.

[Gilmer v. The State.]

JAMES S. PARRISH, and EDWARD T. GRAHAM, for appellant. The court was in error in permitting testimony of the dying declarations as the deceased merely said "if she was not going to get well, she desired to tell about the shooting."—*Sims v. State*, 139 Ala. 74; *Pulliam v. State*, 88 Ala. 3; 5 Mayf. 302. The court was in error in permitting the confessions alleged to have been made to the police officer. The court erred in permitting the cross examination indulged in of defendant while on the stand as a witness.—*Burke v. State*, 71 Ala. 377; *Seams v. State*, 84 Ala. 410.

R. C. BRICKELL, Attorney General, and W. L. MARTIN, Assistant Attorney General, for the State. The court was not in error in the admission of the dying declarations.—*Hussey v. State*, 87 Ala. 128. If the declarant entertains an honest opinion that he will die as a result of the wound, declarations are admissible in evidence.—*Pulliam v. State*, 88 Ala. 3; *Shell v. State*, 88 Ala. 14; *Blackburn v. State*, 98 Ala. 65; *Walker v. State*, 139 Ala. 65; *Pate v. State*, 150 Ala. 16; *McEwin v. State*, 152 Ala. 42; *Henningburg v. State*, 153 Ala. 17. The ruling of the court on defendant's motion for a new trial is irrevisable.—*Brister v. State*, 26 Ala. 107, 133; *Franklin v. State*, 29 Ala. 14, 20; *Dorsey v. State*, 107 Ala. 157, 161; *Sanders v. State*, 131 Ala. 1, 6; *Ferguson v. State*, 149 Ala. 21, 25; *Herndon v. State*, Ala. App. 56 South. Rep. 85, 86.

DE GRAFFENRIED, J.—Accepting as the true version of this matter that phase of the testimony which is most favorable to the defendant, it may be asserted, with perfect confidence, that the defendant, while in a state of voluntary intoxication, intentionally and without any provocation whatever shot and killed a woman.

[Gilmer v. The State.]

There was no theory and no evidence tending to show that the shot was due to accident, and, if the voluntary intoxication of the defendant—conceding the fact of his intoxication—furnishes him with no excuse for the commission of the homicide, then he stands helpless before the law.

1. The rule in this state seems to be well established that voluntary drunkenness never excuses the commission of any crime of which the *quo animo* forms a necessary ingredient unless the drunkenness of the defendant has resulted in his actual insanity and for that reason has rendered him mentally incapable of committing a crime, or unless his drunken condition at the time of the commission of the act renders him incapable of entertaining the specific intent which forms an essential element of the crime. Mere voluntary drunkenness does not excuse or palliate the commission of any crime which is a crime without regard to the intent with which the act is done, and it furnishes no excuse or palliation for an offense of which the *intent* is a necessary ingredient unless it has produced "a state of mind which incapacitates the party from forming or entertaining a specific intent." It is said that men sometimes "brace" themselves with intoxicants for the purpose of nerving themselves to the perpetration of a crime, and, of course, the law will never permit voluntary intoxication to excuse or palliate a crime so committed.—*Whitten v. State*, 115 Ala. 72, 22 South. 483; *Heninburg v. State*, 151 Ala. 26, 43 South. 959; *Heninburg v. State*, 153 Ala. 13, 45 South. 246. In the instant case there was sufficient evidence to justify the conclusion of the jury that at the time the defendant committed the homicide he was, even if voluntarily drunk, capable of forming and entertaining (and that he did actually form and entertain) that specific intent which

[Gilmer v. The State.]

is a necessary ingredient of murder in the first degree. In several written charges which the court gave to the jury on the above subject the law was stated as favorably to the defendant as, under the evidence, it could, with propriety, have been done.

2. The *competency* of dying declarations is exclusively for the determination of the trial court. The credibility and weight of such declarations are for the jury. The trial court first determines from the evidence addressed to it whether the party making the declaration was of the frame of mind required by the law to authorize the admission of the dying declaration, and if, from such evidence, it determines to admit the declaration and actually admits it, then it becomes the sole province of the jury to determine what, if any, weight shall be given to such dying declaration. It is not an indispensable prerequisite to the admission of a dying declaration that the deceased should, in so many words, express a conviction that he is in extremis, that death is impending, and that he has no hope of life; but such a declaration is admissible when, after a careful consideration of all the circumstances, the judicial mind is convinced, by legally sufficient evidence, that, at the time the declaration was made, the deceased was in extremis, that he believed death to be impending, and that he entertained no hope of life.—*Justice v. State*, 99 Ala. 180, 13 South. 658; *Sanders v. State*, 2 Ala. App. 13, 56 South. 69; *McLean v. State*, 16 Ala. 672; *Hussey v. State*, 87 Ala. 121, 6 South. 420. We are of the opinion that there was evidence in this case authorizing the trial court to conclude that when the deceased made her dying declaration she was not only in extremis, but that she believed her death to be impending, and that she entertained no hope of life.

[Gilmer v. The State.]

3. Undoubtedly, the evidence of an officer who testifies to a confession made to him by a person who is in his custody should be received with caution, and trial courts should see to it that no such evidence is received unless it clearly appears that the confession was freely and voluntarily made. Under the evidence in this case, however, the statement made by the defendant to the officer who had arrested him was made freely and voluntarily. The court was therefore free from error in admitting the testimony, and its credibility and weight were for the jury.

4. During his direct examination as a witness in his own behalf, the defendant testified that he had been going to see the deceased six or seven months; that he had been taking her to shows, to an assignation house; that he had been out driving with her, and had taken her to supper and dinner several times, etc. His evidence was plain that during the above period he had been on terms of criminal intimacy with the woman. On cross-examination the defendant was required to state that the last time he went to an assignation house with the woman was two or three weeks before her death. As the intimacy of the defendant with the woman was admitted by the defendant, we are unable to see how this evidence could have been prejudicial to the defendant.

5. The defendant testified that he drank heavily on the afternoon of the homicide and, in substance, that he was drunk when the homicide occurred. The court, against the objection of the defendant, permitted the solicitor on cross-examination to ask the defendant "why he drank so heavily that afternoon." Under our practice this interrogatory was permissible on cross-examination.—*Linnehan v. State*, 120 Ala. 293, 25 South. 6.

[Beasley v. The State.]

6. There are certain other minor matters relating to the rulings of the trial court on the admission of evidence to which exceptions were reserved by the defendant, which we have not discussed. While some of those rulings may have been of doubtful propriety, we find nothing in the evidence which was thereby admitted, which could have had any prejudicial effect upon the jury. We do not discuss these matters because they are not of sufficient merit.

7. It seems to us, after carefully considering this record, that the defendant has had a fair and an impartial trial. The jury have said by their verdict that the crime of which they convicted him should be punished capitally. Jurors, under our law, possess the power which, in this case, they have seen proper to exercise, and the judgment of the trial court has been legally and properly pronounced upon the verdict. There is no error in the record, and we find no reason why the judgment of the trial court pronouncing the defendant guilty of murder in the first degree and sentencing him to death should be disturbed.

Affirmed. All the Justices concur.

Beasley v. The State.

Murder.

(Decided February 13, 1913. 61 South. 259.)

1. *Homicide; Evidence; Threats.*—Where the evidence in a homicide case is conflicting as to who was the aggressor, a defendant may show previous ill will or threats by deceased.

2. *Same.*—The fact that threats made by deceased had been communicated to the accused does not warrant him in commencing the attack until deceased has made some overt act or some hostile demonstration, though a defendant may act upon a slighter demonstration in such an instance than if there had been no threats made.

[Beasley v. The State.]

3. *Same; Overt Act.*—The acts which cause a defendant to really believe himself to be in danger need not be real, but may be appearances only. In view of previous threats made by deceased; but this rule applies only to defensive measures, and does not apply where accused is the aggressor.

4. *Same; Jury Question.*—In view of circumstances leading to the killing, whether threats are a justification is a jury question; consequently where defendant testified that deceased cocked his rifle and started to turn upon him, evidence of previous threats made by deceased became admissible.

5. *Same; Instructions; Self-Defense.*—Charges on self-defense are erroneous if they omit the requirement of a bona fide belief by defendant that he is in danger.

6. *Same; Duty to Retreat.*—Where there was evidence that defendant was in peril, it appearing from his evidence that deceased was about to make a murderous attack upon him, he was under no duty to retreat, and a charge otherwise proper was not rendered bad for omitting the duty to retreat.

(Dowdell, C. J., Anderson and McClellan, JJ., dissent in part.)

APPEAL from Montgomery City Court.

Heard before HON. ARMSTEAD BROWN.

Yank Beasley was indicted for the murder of Ephriam White, convicted, and sentenced to be hanged, and he appeals. Reversed and remanded.

The following charges were refused to defendant:

(1) "The court charges the jury that if they are reasonably satisfied from the evidence in this case that there was a present, impending danger, real or apparent, to the life or limb, or grievous bodily harm, from which there was no probable means of escape, and that the deceased was the aggressor, they cannot convict the defendant."

(2) "The court charges the jury that if the defendant shot under a bona fide belief that his life was in danger, and had under all the circumstances reasonable cause to believe that he was in imminent danger at the moment the shot was fired, then the defendant cannot be convicted."

The evidence tended to show that Ephriam White came to his death about January 2, 1912, from the

[Beasley v. The State.]

effects of a bullet wound fired by Yank Beasley. It appears that defendant and deceased, with several others, were in a wagon going home, and that they talked about 35 or 40 minutes before the shooting; that at the time of the shooting Ephriam White was sitting on the dashboard of the wagon, leaning forward, with a rifle across his lap; and that Yank was sitting on the spring seat about the middle of the wagon. The defendant attempted to bring out by the second witness introduced for the state the fact that White had tried to kill Beasley; but, on objection by the solicitor, the evidence was excluded. When Beasley took the stand to testify in his own behalf, he stated that after the others had gotten out of the wagon, and he was preparing to leave, White got up and clicked his gun twice, and that as he got about three-quarters up he turned his rifle towards defendant. After this testimony defendant was asked if he had had any previous difficulty with White, which was, on motion of the solicitor excluded. Also: "Did Ephriam White shoot at you within two weeks prior to this killing?" Objection to which was also sustained. Also: "State whether or not, within the two weeks prior to the killing, White shot at you twice, one time shooting through your hat, and at another time shooting buckshot into you." Also: "Did Hannah White tell you on the day of the killing that Ephriam White was looking for you to kill you?" Also similar questions as to Tom Carrison; also as to Hannah Harris. Later the defendant put up these various witnesses to show a communication to him of the threats sought to be brought out by the question above referred to, but, on objection by the state, was not permitted to do so.

WEIL, STAKELY & VARDAMAN, for appellant. Where there is evidence tending to prove overt acts or a hostile

[Beasley v. The State.]

demonstration on the part of deceased, previous threats made by deceased against defendant become admissible.—*Turner v. State*, 40 South. 823; *Jackson v. State*, 59 South. 632; *Story v. State*, 71 Ala. 330. The fact and general nature of a similar difficulty between defendant and deceased was admissible in view of the tendency of some of the evidence to support the theory of self-defense.—*Jackson v. State*, *supra*; *Gunter v. State*, 20 South. 632. The question of overt act which will justify a homicide is a question for the jury.—65 Tenn. 452; 160 U. S. 203; 27 South. 643; 27 Tex. 758. There is no necessity that there should be actual danger, since under the circumstances of this case, a defendant may act on the reasonable appearance of things.—*DeArman v. State*, 71 Ala. 351; *McCain v. State*, 49 South. 361. Under the circumstances of this case, the duty of retreating was not on defendant.—*DeArman v. State*, *supra*.

R. C. BRICKELL, Attorney General, and W. L. MARTIN, Assistant Attorney General, for the State. It is a well settled rule of law that if there is any evidence which, if believed, would present a case of self-defense, the defendant may then go further and strengthen it by showing ill will, threats, or a previous difficulty, with deceased, but it is insisted that under the facts in this case, there was no evidence of any act or demonstration on the part of deceased indicating any intention of committing an assault on defendant.—*Harrison v. State*, 24 Ala. 66; *Lewis v. State*, 51 Ala. 1; *Rogers v. State*, 62 Ala. 170; *Holly v. State*, 75 Ala. 14; *Howard v. State*, 110 Ala. 92. There was not a sufficient overt act to indicate a felonious assault, there was no apparent attack and no violence.—*Lewis v. State*,

[Beasley v. The State.]

supra; *Rogers v. State, supra*; *Bain v. State*, 70 Ala. 4; *King v. State*, 90 Ala. 612; *Keith v. State*, 97 Ala. 32.

ANDERSON, J.—The rule is well settled that, when there is a conflict in the evidence, in homicide cases, as to who was the aggressor, the accused may strengthen his defense by showing ill will, threats by the deceased, or a previous difficulty. It is also a well-established doctrine that when the deceased has made threats against the defendant, and which have been communicated to him, he is not thereby authorized to commence an attack or to act upon said communicated threats until the deceased has committed some overt act or made some hostile demonstration; but in such case the law allows the threatened party to act with greater dispatch and upon a perhaps slighter overt act than is required on the part of a defendant who was not threatened by the deceased, or between whom and the accused there was no bad blood or ill will. The mere fear of an attack will not justify action on the part of the defendant; and he cannot avail himself of communicated threats until he first shows some overt act or hostile demonstration on the part of the deceased which would be calculated to reasonably impress upon him the bona fide belief that he was in imminent peril. This does not mean that the supposed facts generating the belief must be real; for they may be appearances only, and yet justify as prompt action as if they were real.—*Jackson v. State*, 78 Ala. 471; *Story v. State*, 71 Ala. 330.

But this principle is confined to defensive measures. It furnishes no excuse or palliation for aggressive action, nor when the difficulty is brought on or sought by the accused.—*De Arman v. State*, 71 Ala. 351. "Whether * * * threats, taken in connection with the circumstances of the affray leading to and accompanying the

[Beasley v. The State.]

killing, are sufficient to justify the act of homicide, is a question of fact for the jury; and it is not permissible for the court to determine it as matter of law. They cannot be excluded if there is the slightest evidence tending to prove a hostile demonstration, which can be reasonably interpreted as placing the accused, at the time of the killing, in apparent imminent danger to life or of other grievous bodily harm.”—*Turner v. State*, 160 Ala. 40, 49 South. 828; *Roberts v. State*, 68 Ala. 156. So the question is: Did the defendant’s evidence tend to establish such a hostile demonstration as could be reasonably interpreted as placing the defendant, at the time he shot, in apparent peril?

It may be true that the defendant’s testimony was opposed by the great preponderance of the evidence, and that his version of the action of the deceased may have been inconsistent with the facts attending the trip from Montgomery to the place of the killing, both being in the same wagon, and no fuss or cross words passed between them, yet the undisputed evidence showed that deceased had a rifle across his lap, the defendant said he heard him cock it, and saw him attempt to change its position, and at the same time starting to turn upon him; and we think that the trial court erred in excluding the threats, as well as evidence of a previous difficulty, as it was a question for the jury as to whether or not this action was sufficient to reasonably indicate immediate danger, and whether or not the defendant could safely retreat. We do not think that the evidence had to show that the deceased had turned entirely around, and had covered the defendant with the rifle, or had shot him, before the conduct of the deceased could be considered an overt act or hostile demonstration; for, if such was the case, the defendant would have to wait until he was shot or placed at a great dis-

[Beasley v. The State.]

advantage before attempting to protect himself against an assailant who had not only threatened his life, but between whom and the defendant there existed bad blood. More prompt and decisive means of defense are justified, when the assailant is of known violent and bloodthirsty nature, or when he has threatened the life of the accused, and said threats have been communicated.—*De Arman's Case, supra*. In determining whether or not the defendant has established a predicate for the admission of threats, whether the evidence is consistent or not, if any of it tends to establish a hostile demonstration such as would reasonably place him in imminent peril, he is entitled to the admission of said threats, unless, of course, the other elements of self-defense are lacking.

Charge 1, requested by the defendant, if not otherwise bad, pretermits a reasonable or bona fide belief by the defendant that his life was in danger.

Charge 2, refused the defendant, if not otherwise bad, pretermits the defendant's duty to retreat. It was a question for the jury, under the circumstances, to determine whether or not the defendant could have retreated without increasing his peril.—*Abernathy v. State*, 129 Ala. 85, 29 South. 844; *Suell v. Derricott*, 161 Ala. 268, 49 South. 895, 23 L. R. A. (N. S.) 996, 18 Ann. Cas. 636.

For the errors above designated, the judgment of the city court is reversed, and the cause is remanded.

Reversed and remanded.

DOWDELL, C. J., and MCCLELLAN, J., concur in the opinion.

MAYFIELD, SAYRE, SOMERVILLE, and DE GRAFFENRIED, JJ., concur in the conclusion and the opinion, except as to charge 2. They think that this charge should have

[Sanders v. The State.]

been given, as there was evidence from which the jury could infer that the defendant was in peril; and, if defendant's version that the deceased was about to make a murderous attack upon him was true, he was under no duty to retreat.—*Cook v. State*, 5 Ala. App. 11, 59 South. 519; *Storey v. State*, 71 Ala. 337.

Sanders v. The State.

Murder.

(Decided February 13, 1918. 61 South. 836.)

1. *Criminal Law; Continuance; Discretion.*—The granting of a continuance in a criminal case on account of the absence of a witness is a matter within the discretion of the trial court.

2. *Same; Misconduct of Jury; Separation.*—Where it was not shown that he mingled with outsiders it was not error, in a murder trial, to refuse to quash the panel of jurors because one of them separated from the others.

3. *Trial; Objections to Evidence; Sufficiency.*—Where a defendant does not object to a question, it is not error to overrule his motion to exclude a relevant answer.

4. *Same; Objections to Instructions.*—A single objection to a part of the charge involving several propositions, some of which are correct, is properly overruled.

5. *Appeal and Error; Harmless Error; Evidence.*—Where the court afterwards excluded irrelevant testimony, its former omission was rendered harmless.

6. *Homicide; Instructions; Abstract.*—Where a homicide was committed while deceased was attempting to arrest defendant, a charge asserting that where there was no reasonable cause to apprehend any worse treatment than a legal arrest would subject one to, he must submit to an illegal arrest and seek redress at law, was harmless to accused, and did not constitute reversible error, even if abstract.

7. *Same; Manslaughter; Resisting Unlawful Arrest.*—The killing to avoid an unlawful arrest, or attempt to arrest, is general manslaughter only, but is not reduced to manslaughter unless committed under the influence of passion induced by the provocation.

8. *Same; Self-Defense.*—One is entitled to resist an unlawful attempt to arrest him, even to the extent of killing the person attempting to make the arrest if necessary to save his own life, or save himself from great bodily harm; but the necessity must be real or reasonably apparent.

[Sanders v. The State.]

9. *Same; Unlawful Arrest.*—In a homicide committed while deceased was attempting to arrest accused as a supposed fugitive from justice, where the evidence showed that deceased was not deputized to arrest defendant, had no process for arrest, and acted on the supposition that accused was a fugitive from justice, defendant was entitled to charges asserting that decedent was not authorized to make the arrest, and the fact that a witness told deceased that he had been informed by a peace officer that such officer was following a woman whose husband had committed a felony, and that the woman had stopped at the house of defendant's relatives, did not constitute probable cause authorizing decedent to attempt the arrest; and that defendant was entitled to reasonably and properly resist an attempt to arrest.

10. *Arrest; Right to Make.*—Decedent had no right to arrest, or to attempt to arrest defendant, where he was not deputized for that purpose, and had no process for the arrest, and acted merely on information that a felony had been committed in an adjoining county; that defendant was a fugitive; that an unknown woman was thought to be the wife of defendant, and that such woman was his wife.

(Dowdell, C. J., and McClellan, J., dissent. Mayfield, J., dissents in part.)

APPEAL from Monroe Circuit Court.

Heard before Hon. JOHN T. LACKLAND.

Henry Sanders was convicted of murder in the first degree, and he appeals. Reversed and remanded.

The bill of exceptions shows that several witnesses who had been summoned for the defendant were not present, and, in fact, only one witness was present; and it was stated by counsel for defendant that the witness present was a character witness, and knew nothing of the facts of the case. On this showing the defendant based an application for continuance, which was declined; and it was not shown to the court what was expected to be proved by the witness, nor where the witnesses resided. The court, however, granted an attachment for these witnesses, but declined to continue the case to another day of the term to await service of the process. The bill of exceptions further shows that after the jury had been selected, impaneled, and sworn, and the state was proceeding to state the case to the jury, it was discovered that one of the jurors was absent;

[Sanders v. The State.]

but very soon he returned into court, and thereupon the defendant moved to quash the panel, and objected to proceeding with the trial with that jury. The court then asked the juror if he had seen or talked with any one while he was away, and the juror replied that he had not seen or talked with any one, as there was nobody in the room but him. Whereupon the court declined to quash the panel, and the defendant excepted.

The witness Brantley, in answer to a question propounded by the solicitor, testified as follows: "Clinton Brantley, the man killed, was my brother; he was killed in McWilliams, at Henry Langham's store, in this county, by Henry Sanders. My brother went over to the store to arrest him for a negro wanted at Pine Hill. This man had followed a woman there; said that this woman's husband was a man they wanted at Pine Hill for killing another man. He told my brother that." In the above testimony the witness was referring to a deputy sheriff from Wilcox county. The defendant objected to the testimony on certain grounds stated, and before the defendant's objection was ruled on by the court the solicitor asked the following question: "I understood you to say that Clinton Brantley had been informed that this man was wanted for killing some one on the Southern Railway?" To which the witness replied in the affirmative. The defendant then renewed his objections on the grounds stated, and also moved the court to exclude the evidence. On the cross-examination of the same witness, he testified that the man who came to McWilliams from Pine Hill was a deputy, and not in fact searching for Henry Sanders, but was after a negro named Johnson. "I did not have any conversation with this officer from Wilcox county. It was my brother who had the conversation, and I was not present at the conversation." The defendant moved to exclude

[Sanders v. The State.]

all the testimony about the witness' brother getting information from the man that he was hunting for a negro from Pine Hill, and the court replied, "I will exclude all he would say about having received information from anybody up to this time," and the defendant excepted.

The oral charge of the court excepted to was as follows: "The evidence for the state tends to show you that at a railroad station in this county, some time back, that the deceased, as the defendant was getting off the train, asked if that was he, or that the deceased had just come there on the train; that is for you to say; I don't remember. But at that gallery at that place, at that time, the question was asked if this was Henry Sanders, and I don't remember what reply was made; but you remember. Now, the next reply was, 'Consider yourself under arrest,' and just about that time, the evidence here tended to show, he pulled his pistol and fired the shot. Well, now, gentlemen, was that a willful, malicious, deliberate, and premeditated homicide? If so, unless mitigated in some way by the evidence offered, that would be murder in the first degree, the penalty of which would either be death, or imprisonment in the penitentiary for life. If that homicide was willful and malicious, but not deliberate and premeditated, then it would be murder in the second degree."

Witness Hughes testified that he was the constable and deputy sheriff, and was called up over the phone by a man who told him that he was following a woman, who was the wife of defendant, and that he was watching her, thinking that she would go to her man some time. "The man requested me to come to McWilliams, and told me these things, and I told Clinton Brantley that there was a man in town hunting a negro from Pine Hill, charged with murder, and I asked Clinton

[Sanders v. The State.]

and Elmore Brantley to help me get him located and arrested. We looked for the negro on Sunday night, but failed to find him. I told Clinton Brantley to do the arresting and watch the woman, and that there was a reward for the arrest of this negro."

The court gave, at the request of the state, the following charge: "The court charges the jury that, when there is no reasonable cause to apprehend any worse treatment than a legal arrest would subject him to, it is the duty of a person to submit to an illegal arrest and seek redress at law." After the reading of this charge, the court remarked: "When a man is arrested, it is his duty to submit to the law and wait on the action of the law, unless the mere fact of an arrest subjects him to worse treatment than he would otherwise get."

The following charges were refused to the defendant:

(20) "I charge you that, under the facts shown by the evidence in this case, Clinton Brantley was not authorized to arrest the defendant."

(21) "I charge you that the fact that the witness Hughes told Brantley that he had been informed by a peace officer that such officer was following a negro woman whose husband had committed a felony, and that the woman had stopped at the house of defendant's relatives, did not constitute probable cause, authorizing Brantley to attempt the arrest of the defendant; and the defendant was authorized to reasonably and properly resist such attempted arrest, provided such resistance was not greatly disproportionate to his threatened injury."

(22) "I charge you that the witness Hughes was not such an officer of the law as was authorized to deputize the deceased to lawfully arrest the defendant."

(24) "I charge you that, under the evidence in this case, the state has failed to show that Clinton Brantley

[Sanders v. The State.]

was legally authorized to attempt the arrest of the defendant; and that in making such attempt he was committing a trespass, which the defendant had a right to resist, provided such resistance was not greatly disproportionate to his threatened injury."

F. W. HARE, for appellant. Counsel discusses the refusal of the court to grant defendant a continuance and insists that the facts remove it from the influence of the stated doctrine that it is within the discretion of the trial court. The court erred in failing to grant the motion of defendant to quash the panel because of the separation of the juror.—*Williams v. State*, 45 Ala. 57; *Robbins v. State*, 49 Ala. 394; *James v. State*, 53 Ala. 380. The court erred in refusing charges 1, 6, 8, 12, 14, 16, 11, 22, 23, 20, 24, 21 and 26 requested by defendant.—*Snell v. Derricot*, 49 So. 895; 3 Cyc. 875; *Morrell v. Quarles*, 45 Ala. 544; *Cary's case*, 76 Ala. 78; *Brown v. State*, 109 Ala. 70. Counsel discusses the evidence, but without further citation of authority.

R. C. BRICKELL, Attorney General, and W. L. MARTIN, Assistant Attorney General, for the State. No error can be imputed to the action of the court in declining a second continuance on account of the absence of the same witness. In any event, it was within the discretion of the trial court.—*Cunningham v. State*, 117 Ala. 59; *Carr v. State*, 104 Ala. 4; *Davis v. State*, 92 Ala. 20; *White v. State*, 86 Ala. 69; *Ex parte Jones*, 66 Ala. 202; *Starr v. State*, 25 Ala. 49. Defendant's motion to quash the venire was properly overruled.—Sec. 29, Acts 1909, p. 17; *Bailey v. State*, 55 South. 601; *Savage v. State*, 57 South. 469. The defendant's only recourse was to move for a discharge on the ground that he had been placed in jeopardy or for a motion

[*Sanders v. The State.*]

for a new trial, either of which would have been unavailing.—*Williams v. State*, 45 Ala. 57; *Robbins v. State*, 49 Ala. 394. Objections to questions must be interposed when the questions are asked.—*So. Ry. v. Laird*, 146 Ala. 349; *Washington v. State*, 106 Ala. 58. It is proper to show the authority of deceased to arrest defendant, he having been told that he was wanted for homicide.—*Corey v. State*, 76 Ala. 78; Sec. 6272, Code 1907. Exceptions are not sustained when taken to a charge as a whole, parts of which state correct propositions.—*Lacy v. State*, 154 Ala. 65. Charges 21, 6, 12, 22 and 23 were properly refused.—*Corey v. State*, *supra*. Charge 16 was incomplete.—*Dryer v. State*, 139 Ala. 117. The other charges were either charges on the weight of evidence, or were abstract, or were incorrect attempts to state the law of arrest by a private person, and were hence properly refused.—Authorities *supra*.

MAYFIELD, J.—The first error insisted upon is the refusal of the court to grant a continuance of the case on account of the absence of witnesses. It has been uniformly decided by this court that granting or refusing a continuance is a matter resting in the discretion of the trial court, and is not reversible on appeal.

The next assignment insisted upon is that the court erred in not laying the case over until the officers of the court had had the time to issue and return the compulsory process for the defendant's witnesses, which the court had ordered issued, because it would be "an empty mockery to grant the defendant the attachments, without giving the defendant an opportunity to reap the benefit from the order of the court granting the attachments."

The majority of the court are of the opinion that there was no error in the court's refusal to quash the

[*Sanders v. The State.*]

panel of jurors. The juror who separated from the others was shown not to have mingled with the crowd, and not to have conversed with any one. He merely stepped into a closet, in which there was no other person. It therefore affirmatively appears that no injury resulted therefrom.

We find no reversible error in the rulings of the court admitting or rejecting testimony offered. Counsel for appellant complains of the condition of the record, and concedes that it is difficult to review the rulings on the evidence for lack of "clearcut and distinct exceptions." To this we must answer, that we can only review the record presented to us. Some of the evidence admitted against the defendant was not admissible, if prompt and proper objections had been interposed and proper exceptions reserved to the action of the court in admitting it. In some instances it does not appear that any objection was interposed to questions, yet motions were made to exclude the answers, which were responsive. A party cannot thus speculate as to whether the answer will be favorable or unfavorable, and, if the latter, then move to exclude it. Moreover, the court did subsequently exclude some of this irrelevant testimony thus admitted. For example, the court excluded all that George Brantley said as to having received information that the deputy from Wilcox was hunting for a negro from Pine Hill, Wilcox county, and all the testimony as to the woman in question being the wife of the defendant.

Some parts of the oral charge excepted to stated parts of the evidence which were undisputed and did not charge upon the effect of the evidence. The part excepted to involved more than one distinct proposition of law, and some of these propositions were correct. If we concede that some of that excepted to was bad, we

[*Sanders v. The State.*]

could not reverse, because it was not separated from that which was good; and if the court had excluded that part which was excepted to it would have excluded that which stated a correct proposition of law applicable to the case. And, of course, the defendant had no right to have that.

There was no error in giving the charge requested by the state, nor in the remarks of the court explaining it to the jury. If it could be said to be abstract, this is not ground for reversal because of giving it.

Under the undisputed evidence in this case, the deceased had no authority or right to arrest, or to attempt to arrest, the defendant on the occasion when the deceased was killed. The constable and deputy sheriff, Hughes, had no authority, under the evidence in this case, to deputize the deceased to arrest the defendant on the occasion on which he attempted to arrest him.

This case is much like that of *Lewis v. State*, 178 Ala. 26, 59 South. 577. In fact, the defendant in that case killed the person who had arrested him without authority of law, and, strange to say, he was the "individual desired," when this defendant was attempted to be arrested, for no other reason than that his wife had been mistaken for the wife of Lewis. In the *Lewis Case*, *supra*, it was claimed by the state that the deceased, the party making the arrest, had been deputed for that purpose by another deputy, and was also armed with a warrant or *capias* to that end. In the case at bar there is no pretense that deceased was deputed to arrest this defendant, or that he had any process for the arrest of this defendant. In fact, there was no warrant or *capias* against this defendant, and no claim that there was. The most that can be said to justify deceased in attempting to arrest the defendant was that he had been informed that a felony had been committed in an

[Sanders v. The State.]

adjoining county, and that the felon was a fugitive; but he had never been informed that this defendant was the felon, but had been informed merely that an unknown woman was in the town of McWilliams, and that she was thought to be the wife of the felon, and he subsequently learned that she was the wife of defendant. The deceased, so far as the evidence shows, knew the defendant, and had known him a long time, and knew he was not a fugitive, and had never been so informed, so far as this record shows. It does appear, however, that deceased was instructed by the constable, Hughes, to locate the husband of this woman whom the deputy from Wilcox had followed to McWilliams; and that there was a reward of \$200 offered for the arrest of the fugitive. But there was no probable cause to believe that this defendant was the fugitive.

“Every homicide, perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or the attempt to perpetrate, any arson, rape, robbery, or burglary, or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed; or perpetrated by any act greatly dangerous to the lives of others, and evidencing a depraved mind regardless of human life, although without any preconceived purpose to deprive any particular person of life, is murder in the first degree; and every other homicide committed under such circumstances as would have constituted murder at common law, is murder in the second degree.”—Code 1907, § 7084.

In the case of an unlawful arrest, or attempt to arrest, killing the person attempting it is, as a general rule, manslaughter only. A person seeking unlawfully to arrest another is a trespasser; and the trespass is

[Sanders v. The State.]

a ground of provocation sufficient to reduce the homicide of such person in resistance of the arrest from murder to manslaughter, though it is not so reduced, unless the person sought to be arrested actually acted under the influence of hot blood induced by the provocation. And such an attempt unlawfully to arrest gives the person sought to be arrested a right to resist, even to the extent of killing his opponent, if such killing is necessary to save his own life, or to save himself from serious bodily harm; but the necessity must have been real or apparent. The amount of force which he may use in self-defense, however, is that only which is necessary to prevent the carrying out of the unlawful purpose. If excessive force is used in making resistance, the right of self-defense is eliminated; and killing, by means calculated to cause death, with knowledge that the intent was only to arrest, is murder; and an unintentional killing in making such resistance, by means not calculated to cause death, is manslaughter.—66 L. R. A. 386, 387.

“As a general rule, at common law an arrest could not be made without warrant. If a felony was committed, or a breach of the peace threatened or committed, within the view of an officer authorized to arrest, it was his duty to arrest without warrant and carry the offender before a magistrate. Or, if a felony had been committed, and there was probable cause to believe a particular person was the offender, he could be arrested without warrant.—*Holley v. Mix*, 3 Wend. [N. Y.] 350, 20 Am. Dec. 702; *Burns v. Erben*, 40 N. Y. 463. The matter of arrests is now the subject of statutory regulation, largely affirmatory of the rules of the common law.—Cr. Code 1886, §§ 4260-4274. The statutes, and the corresponding rules of the common law, have primary, if not exclusive, relation to the administration

[*Sanders v. The State.*]

of the criminal laws of the state.”—*Cunningham v. Baker*, 104 Ala. 169, 16 South. 70, 53 Am. St. Rep. 27.

“An officer cannot justify an arrest upon the ground that he had reasonable cause to believe the person arrested had committed a felony, unless he has information of facts, derived from those reasonably presumed to know them, which, if submitted to a judge or magistrate having jurisdiction, would require the issue of a warrant of arrest and the holding of the accused to await further examination.—*Malcolmson v. Scott*, 56 Mich. 459 [26 N. W. 166].” *Cunningham v. Baker*, 104 Ala. 171, 16 South. 71, 53 Am. St. Rep. 27.

This same doctrine was again announced in the recent case of *Suell v. Derricott*, 161 Ala. 274, 275, 49 South. 901, 23 L. R. A. (N. S.) 996, 18 Am. Cas. 636, where it is said: “As a general rule, at common law an arrest could not be made without a warrant; but if the felony or breach of the peace threatened or committed within the view of an officer authorized an arrest, it was his duty to arrest without warrant, or, if a felony had been committed, and there was probable cause to believe that the particular person was the offender, he could be arrested without a warrant; but the matter of arrest is now in this state largely the subject of statutory regulation, which in some degree is an affirmation of the rules at common law. Of course, an officer or a private citizen, under the statute, cannot justify an arrest upon the ground that he had reasonable cause to believe the person arrested had committed a felony, unless he has information of facts, derived from credible sources, or from persons reasonably presumed to know them, which, if submitted to the judge or the magistrate having jurisdiction, would require the issue of a warrant of arrest.—*Cunningham v. Baker*, 104 Ala. 171, 16 South. 68, 53 Am. St. Rep. 27.”

[*Sanders v. The State.*]

"In all cases of the killing of an officer, or of an assistant, in resistance of an arrest, a material inquiry, in determining the degree of the homicide, is whether the party resisting had knowledge or notice of official character and of presence for the exercise of official authority. If there is not such knowledge or notice, the homicide cannot be more than manslaughter, unless the resistance was 'in enormous disproportion to the threatened injury.'—*Noles v. State*, 26 Ala. 31 [62 Am. Dec. 711]; 1 Russell on Crimes, 835; 1 Whart. Am. Cr. Law (9th Ed.) § 413; *Commonwealth v. Drew*, Cases on Self-Defense, 718; *Croom v. State*, 85 Ga. 718 [11 S. E. 1035] 21 Am. St. Rep. 179; *Roberts v. State*, 14 Mo. 138, 55 Am. Dec. 97." *Brown v. State*, 109 Ala. 89, 90, 20 South. 110.

"It is not the duty of the citizen to submit to any other than a lawful arrest. It has been said the duty is found in the law side by side with the right of resistance to an unlawful one; and it is quite as important that no one should be unlawfully taken as that every one lawfully accused should be made to answer.'—*Drennan v. People*, 10 Mich. 169. The requirements of the statute are drawn from and in affirmation of the common law. They are ample to secure the execution of and submission to legal process; but they are equally intended to protect the citizen from unlawful interference with his personal liberty. It is not intended that he shall yield his person and liberty to the dominion of even a known public officer, certainly not to one unknown, upon his mere demand, who gives no information of his authority. If this were not true, no man would be safe from invasions of his personal liberty, and unlawful arrests would be made effectual."—*Brown v. State*, 109 Ala. 91, 20 South. 111.

[*Sanders v. The State.*]

But the mere fact that an illegal arrest is being attempted does not, without more, justify the party being arrested in killing the party attempting to make the arrest. The law upon this subject has been well stated in *Noles' Case*, 26 Ala. 31, 42 (62 Am. Dec. 711): "To excuse one individual for taking the life of another, there must exist a necessity to prevent the commission of a felony or great bodily harm, or a reasonable belief in the mind of the slayer that such necessity does exist. If there is neither the existence of such necessity, nor any reasonable belief of its existence, the law will not acquit the slayer of all guilt.—*Oliver v. State*, 17 Ala. 587; *Pritchett v. State*, 22 Ala. 39 [58 Am. Dec. 250]. The case of a mere trespass upon the person and liberty of the slayer, which created no reasonable belief in his mind that any of the trespassers would commit any felony or do him any great bodily harm, cannot be allowed to constitute an exception to the foregoing rules. When such trespass is threatened or committed, he has no *right* to kill, unless the unlawful act, when properly and lawfully resisted by him, is persisted in by the trespasser, until it ultimately results either in an actual necessity on his part to kill, in order to prevent the commission of a felony or great bodily harm, or in the reasonable belief by him of the existence of such necessity."—22 Ala. 42, 58 Am. Dec. 250. "We admit the right of any citizen to resist any attempt to put any illegal restraint upon his liberty. But his resistance must not be in enormous disproportion to the injury threatened. He has no right to kill to prevent a mere trespass, which is unaccompanied by any imminent danger of great bodily harm or felony, and which does not produce in his mind any reasonable belief of such danger."—22 Ala. 43, 58 Am. Dec. 250.

[*Sanders v. The State.*]

It follows, in the opinion of Justices ANDERSON and SAYRE and of the writer, that charges 20, 21, 22, and 24, requested by the defendant, stated correct propositions of law as applied to the facts of this case, and had no duplicates; and that their refusal was reversible error.

Justices SOMERVILLE and DE GRAFFENRIED are of the opinion that charges 20, 21, and 24 were correct, and should have been given, but are not willing to reverse as to charge 22. None of the Justices, however, except the writer, is willing to reverse as to the action of the trial court in declining to postpone the trial until the process desired for the witness should be issued and returned; so what is hereafter said by the writer on this subject is his individual view, and not that of the court.

There were, however, other charges requested by the defendant, which stated correct propositions of law, but as to each of such the court gave other written charges which were substantial duplicates of those refused, and as to these it was error without injury.

Reversed and remanded.

ANDERSON, SAYRE, SOMERVILLE, and DE GRAFFENRIED, JJ., concur, as above shown. DOWDELL, C. J., and McCLELLAN, J., dissent.

MAYFIELD, J.—(concurring).—The writer, however, for himself only, desires to say:

I think there was reversible error in this particular case. The state Constitution secures to the defendant in criminal cases, among other rights, the right "to have compulsory process for obtaining witnesses in his favor."

This court, in *Walker's Case*, 117 Ala. 85, 88, 23 South. 670, said: "No convenience of the court, nor any condition of the docket of the cases for trial, can

[*Sanders v. The State.*]

authorize the denial of this right to the accused, guaranteed to him by the Constitution of the state."

In the case of *Rodgers v. State*, 144 Ala. 34, 40 South. 573, this court, through Simpson, J., said: "It is true that, although the matter of continuance is, as a general rule, within the discretion of the trial court, and will not be reviewed, yet the courts will not allow this rule to operate to the extent of depriving a defendant of the benefits of the constitutional guaranty 'to have compulsory process for obtaining witnesses in his favor.'—*Walker v. State*, 117 Ala. 85, 88, 23 South. 670, 671; *Hill v. State*, 72 Miss. 527, 17 South. 375. In order, however, to bring the matter properly before this court, the defendant is required to make proper motions and exceptions in the court below, so that the record may show whether or not he has been deprived of a substantial right."

Such motions and exceptions were interposed in this case. The bill of exceptions in one place contains this recital: "It was not shown to the court where such witnesses resided, nor what the defendant expected to prove by them" But, preceding this negative recital or conclusion, it is affirmed that "all the witnesses but one resided in the state; that they were material witnesses; that they were eyewitnesses; and that they were not absent by consent of the defendant." Moreover, the only purpose of stating the residence of the witness is to show whether he can be reached and his attendance secured by compulsory process, and whether or not the issuance of the process would be futile.

Likewise, the only purpose of a showing as to what the defendant expects to prove by the witnesses is to show whether or not such evidence would be relevant or material, and, therefore, whether or not the process would be of any service to the accused.

[Sanders v. The State.]

It was clearly shown in this case that the witnesses, all but one, could have been brought into court by process; and that they were material witnesses to the very *res gestæ* of the killing. Moreover, it conclusively appears that the court considered the showing sufficient, because it twice ordered the process to issue, but twice declined to postpone the trial so as to allow the process to be served and the witnesses brought in. I cannot understand why the court should have ordered the process to issue, when it was informed that, unless the trial was postponed to allow the process to issue and be returned, its issuance would be an empty mockery. This, in my opinion, was, in effect, to deny to the accused his constitutional right to the process. To order it to issue, when it was evident that it could not be issued and returned in time to be of any service, was tantamount to denying the right to the process.

These constitutional rights, secured to defendants in criminal trials, should no more be evaded than denied. The courts are the guardians of these rights, and must see that they are enforced—secured to the defendants for whose benefit they were reserved by the people out of the powers granted by the Constitution, and for this purpose written into the Bill of Rights.

An appeal very similar to this was brought before the Supreme Court of Arkansas. In that case the constitutional guaranty was attempted to be evaded or gotten around, both by a statute and a rule of practice of the court as to showings for absent witnesses; and that court, through Cockrill, C. J., spoke as follows: "Section 10 of the Declaration of Rights in the Constitution of 1874, among other things, guarantees to the accused in all criminal prosecutions the right 'to have compulsory process for obtaining witnesses in his favor.' It is not necessary to recount the evils entailed by the

[Sanders v. The State.]

ancient criminal prosecution, when the accused was allowed to swear no witness to his defense, or to give the history of the struggle, which led to the guaranty to the accused of the right to have his witnesses deliver their testimony orally at the time and place of trial, in order to understand the meaning of this provision. 'Compulsory process for obtaining witnesses means the right to invoke the aid of the law to compel the personal attendance of witnesses at the trial, when they are within the jurisdiction of the court. It is a substantive right, a real right, and not an illusory sham to be satisfied by the issue of process, which is to be rendered ineffectual by hastening on to immediate trial. A reasonable opportunity to make the process effective must be afforded; else what the framers of the Constitution term 'a right to be enjoyed' by the accused is only a mockery to vex him. The process is 'for obtaining witnesses'—not the less availing concession of the prosecuting officer that the witness, if obtained, would swear to the statements made by the accused. The personal presence of a witness of truth is of inestimable value before a jury; and if the application of the statute in question to criminal prosecution would abridge the constitutional right to compel his attendance the statute cannot be made to apply to that class of cases. The Legislature is powerless to proceed in the face of the constitutional restraint. No consideration of expediency, of cost, or convenience in the rapid disposition of causes on the criminal calendar can enter into the determination of the question; it is simply one of power, and in that the Constitution has set the boundary to the courts and Legislature alike, without granting to either the discretion to depart from its mandate upon any idea of expediency.'—*Graham v. State*, 50 Ark. 164, 165, 6 S. W. 722.

[Watson v. The State.]

Watson v. The State.*Murder.*

(Decided February 6, 1913. 61 South. 334.)

1. *Witnesses; Competency; Wife of Accomplice.*—On a trial of co-defendants, where a severance has been demanded and granted, the wife of a co-defendant not on trial is a competent witness against her husband's alleged accomplice so long as she is not required to testify to facts tending to incriminate her husband.

2. *Evidence; Reputation of Accused.*—The good reputation which a defendant may establish must be general, and it is not error therefore to exclude testimony as to how defendant "stood with the law-abiding people;" nor is it error to exclude a question as to whether witness knew defendant's character for peace and quiet in the neighborhood, as being too narrow.

3. *Trial; Exceptions to Evidence; Necessity.*—The fact that exceptions were taken to testimony that a witness was present when another person was taken to see if she could identify defendant as a man she saw previously, were not sufficient to preserve objections to subsequent hearsay testimony that such person did so identify the accused.

4. *Homicide; Evidence.*—Evidence as to decedent's character was not admissible in the absence of evidence tending to show that defendant was acting in self-defense.

5. *Same; Degree; Execution of Unlawful Plot.*—A killing pursuant to a conspiracy to do a decedent grievous bodily harm renders each conspirator guilty of murder.

APPEAL from Jefferson Criminal Court.

Heard before Hon. M. FRANK CAHALAN.

William Watson was convicted of murder in the first degree and he appeals. Affirmed.

The question to the witness Mack Sewell was after he had testified to defendant's good character: "Do you know his character for peace and quiet in that neighborhood?" Charge 2 is as follows: "If the jury believe from the evidence that William Watson had no reason to believe, and did not believe, that Arthur Jones or Walter Jones intended to take the life of John Holland,

[Watson v. The State.]

but merely intended to do him grievous bodily harm, then the defendant would not be guilty of murder in the first degree, even though the defendant knew that a difficulty might arise in which John Holland's life might be taken."

JULIUS W. DAVIDSON, and WILLIAM H. SMITH, for appellant. Admissions implied from silence are received with great caution.—*Breil v. Exchange Nat. Bank*, 172 Ala. 479. The wife of a co-defendant is an incompetent witness.—*Woods v. State*, 76 Ala. 38. This is true as against a co-defendant of the husband.—6 Enc. of Evid. *Fincher v. State*, 58 Ala. 215; *Howell v. State*, 58 Ala. 364. The court was in error in permitting the evidences of identification, and the fact that identification was made as it all called for hearsay testimony.—1 Mayf. 324; *Cotton v. State*, 87 Ala. 75. On a trial for murder defendant can always introduce evidence of his good character for peace and quiet in the neighborhood.—*Gibson v. State*, 89 Ala. 121; *Field v. State*, 47 Ala. 603; *Morgan v. State*, 88 Ala. 22; 12 Cyc. 413, and authorities there cited. While parties are responsible for acts growing out of a general design, they are not responsible for individual acts growing out of the particular malice of the individual.—*Williams v. State*, 81 Ala. 1; *Pierson v. State*, 99 Ala. 148; *Evans v. State*, 109 Ala. 11.

R. C. BRICKELL, Attorney General, W. L. MARTIN, Assistant Attorney General, and BORDEN H. BURR, for the State. In the absence of evidence showing self-defense, evidence as to the character of deceased for peace and quiet is not admissible.—*Robinson v. State*, 155 Ala. 67; *Green v. State*, 143 Ala. 2; *Rutledge v. State*, 88 Ala. 85; *Jackson v. State*, 90 Ala. 590, and

[Watson v. The State.]

authorities there cited. The attempt to prove the character of defendant was not general, but was confined to too narrow limits. The wife is a competent witness against a co-defendant where a severance has been granted, and her husband is not on trial, provided she is not required to incriminate the husband.—*Woods v. State*, 76 Ala. 35; 6 Enc. of Evid. 808; 5 Wig. 235, and authorities cited. Charge 2 was properly refused.—*Stiles v. State*, 59 South. 698; *Martin v. State*, 89 Ala. 115; *Turner v. State*, 97 Ala. 57.

SAYRE, J.—Defendant was indicted jointly with several others for the murder of one John Holland. On defendant's motion there was an order of severance and he was tried separately. John Wade, one of the defendants named in the indictment, and his wife, testified willingly for the state. There was no error in receiving the wife's testimony. A severance having been ordered (*Holley v. State*, 105 Ala. 100, 17 South. 102), the wife was a competent witness against her husband's alleged accomplice so long as she was not compelled to testify to facts tending to criminate her husband.—*Woods v. State*, 76 Ala. 35, 52 Am. Rep. 315; 6 Encyc. Ev. 880(3). See, in this connection, *Johnson v. State*, 94 Ala. 53, 10 South. 427.

Several witnesses deposed that they knew defendant's general character in the neighborhood in which he lived at the time Holland was killed, and that it was good. Defendant reserved an exception because he was not allowed in addition to ask one of them "how he stood with the law-abiding people out there." Defendant's purpose was to add weight to the evidence of his good reputation. He got all he was entitled to have in the testimony of the witness as to his general character. Reputation—and that is what the witness was asked

[Watson v. The State.]

about—to be provable must be a general reputation. It is “what is generally said of the person by those among whom he dwells or with whom he is chiefly conversant.”—*Sorrelle v. Craig*, 9 Ala. 534. It is not necessary that the witness shall know all the opinion of all the neighbors of the person whose character is in issue.—*Hadjo v. Gooden*, 13 Ala. 718. Nor is unanimity of opinion to be expected. “But, if it is not general, then, obviously, it does not exist as a fact, and evidence cannot be received to show a partial, limited, or qualified repute. The existence of a diversity of opinion is one of the means by which a witness may know there is a general reputation, but this means of knowledge, apart from the fact that there is or is not a general reputation, and as a totally independent circumstance, is not the thing to be proved.”—*Jackson v. Jackson*, 82 Md. 17, 33 Atl. 317, 34 L. R. A. 773, quoted in section 1612, 2 Wigm. Ev. To this effect are our cases, a number of which may be found cited in *Walker v. State*, 91 Ala. 80, 9 South. 87, a case directly in point. On cross-examination inquiry as to details and the extent of the witness’ knowledge is allowed for testing the soundness and value of his opinion.—*Jackson v. State*, 78 Ala. 471. On the examination in chief the inquiry ought always to be of general character.

On the rule laid down, the question asked of the witness Mack Sewell was too narrow, and error will not be affirmed of the court’s action in sustaining the state’s objection to it.

There was no error in the rulings in reference to the evidence offered to prove the character of deceased. In the evidence offered on behalf of the state there was not the faintest glimmer of any hostile act upon the part of the deceased, while the defense was that defendant was not present and had neither part in nor knowledge

[Watson v. The State.]

of the killing of deceased. In the absence of some showing of self-defense, the character of the deceased was not admissible in evidence for any purpose.—*Green v. State*, 143 Ala. 10, 39 South. 362.

Counsel for appellant mistakenly reads the record as showing that he objected or excepted to the action of the trial court in allowing the state to prove by hearsay that one of the witnesses for the state had identified defendant in the jailyard as a person she had seen about the time of the killing under circumstances to connect him with the killing. He objected and excepted only to the first question put to the witness Thompson, by whom another witness' identification of defendant was proved. That question inquired whether the witness had been present in jail when Mrs. Wade was "taken over to see if she would identify this man (the defendant) as being the man she saw last June." The answer was, "I was." This question and the answer were introductory only and quite harmless in themselves. The court could not know what was to follow. Defendant should have persevered. He should have objected when the examination and the testimony reached the point of proving that another witness had identified the defendant. But at that point he said nothing. The court cannot be put in error on this showing.

Charge 2, requested by defendant, was properly refused. The evidence for the state tended strongly to show a deeply laid plot between defendant and his co-defendants to take the life of deceased and the execution of the plot in cold blood and without any pretense of extenuation or justification. There is in the evidence nothing to suggest the thought that defendant's co-conspirators intended merely to do deceased grievous bodily harm without going to the extremity of taking his life. But conceding that a jury might possibly have inferred

[Adams v. The State.]

a purpose in accord with the hypothesis of the charge, the charge was nevertheless erroneous. To kill in the execution of such a plot is for each conspirator to commit murder.—*Martin v. State*, 89 Ala. 115, 8 South. 23, 18 Am. St. Rep. 91.

Some other rulings are noted for error in the bill of exceptions, though they are not argued by counsel. They have been examined. No reversible error has been found, and the sentence of the law must be executed.

Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

Adams v. The State.

Murder.

(Decided February 13, 1913. Rehearing denied March 17, 1913.
61 South. 352.)

1. *Criminal Law; Change of Venue; Local Prejudice.*—The facts considered and it is held that the trial court will not be reversed for denying a change of venue two months after the cause was reversed in the Supreme Court, twelve months after the trial in the trial court, and sixteen months after the commission of the homicide, especially where the state introduced affidavits tending to show that any prejudice which had existed had subsided before the application for the change of venue, and that a fair and impartial trial could reasonably be expected.

2. *Same.*—The defendant seeking a change of venue on account of local prejudice has the burden to show that a fair and impartial trial could not be reasonably expected at the time that the application is made, and this rule is not changed by section 7851, Code 1907, as amended by Acts 1909, p. 212.

3. *Witnesses; Examination and Cross; Defendant as Witness.*—Where a defendant appears voluntarily, is sworn and testifies as a witness, he is properly permitted to be cross-examined as any other witness.

APPEAL from Montgomery City Court.

Heard before Hon. ARMSTEAD BROWN.

John Adams was convicted of murder in the first degree and he appeals. Affirmed.

[Adams v. The State.]

TILLEY & ELMORE, for appellant. The application for a change of venue should have been granted under the showing made by defendant, and under the facts as they were shown to exist.—*Byers v. State*, 105 Ala. 31; *Salm v. State*, 89 Ala. 59; *Howard v. State*, 159 Ala. 39; *Seams v. State*, 84 Ala. 410; *Hawes v. State*, 88 Ala. 37; *Howard v. State*, 165 Ala. 18; *Terry v. State*, 120 Ala. 286; *Kelly v. State*, 160 Ala. 48. Counsel discuss the evidence, and insist that it does not make out a case of murder in the first degree.

R. C. BRICKELL, Attorney General, and W. L. MARTIN, Assistant Attorney General, for the State. Applications for change of venue are addressed largely to the discretion of the trial court, and will not be reviewed unless the court can see clearly that the trial court's action was wrong.—*McDaniel v. State*, 162 Ala. 25. The case presented is not strong enough to justify this court in reviewing the action of the trial court.—*Hussey v. State*, 87 Ala. 121; *Horn v. State*, 98 Ala. 28; *Jackson v. State*, 104 Ala. 1; *Daughdrill v. State*, 113 Ala. 7; *Terry v. State*, 120 Ala. 286, 290; *Thompson v. State*, 122 Ala. 12, 19; *Lide v. State*, 133 Ala. 43, 64. The State was properly permitted to cross-examine the defendant when he offered himself as a witness in his own behalf.—*Cotton v. State*, 87 Ala. 103; *Clark v. State*, 78 Ala. 474, 478; *Williams v. State*, 98 Ala. 52.

DE GRAFFENRIED, J.—This is the second appeal in this case. See *Adams v. State*, 175 Ala. 8, 57 South. 591.

(1) One of the contentions of the defendant is that the trial court committed reversible error in refusing to grant him a change of venue.

[Adams v. The State.]

On October 6, 1910, the defendant, who is a negro, was convicted for the murder of a white man, who, at the time of his death, was a member of the police force of the city of Montgomery. The homicide was committed shortly before the finding of the indictment; and for some time after the homicide the newspapers of the city of Montgomery published articles which, for the purpose of this opinion, may be conceded to have been well calculated to damage the defendant in the estimation of the public and to create passion and prejudice against him. The sheriff, it seems, guarded the jail, and at one time, for the protection of the defendant, called out the state troops, who were in Montgomery.

The defendant was tried in March, 1911, and large numbers of people attended the trial. The defendant, at the trial, was found guilty of murder in the first degree, and was sentenced to death. At the conclusion of the trial the trial judge made the statement, in open court, that he was of the opinion that every one who had heard the trial believed that the defendant had received a fair trial, and that the verdict was a just one. This statement of the trial judge also found its way into the Montgomery papers, and is claimed by the defendant to have added to the alleged prevailing impression of his guilt.

The case was appealed to this court, and the judgment of the trial court was reversed by this court in January, 1912. This feature of the case was also commented upon, and in one of the papers it was stated that as soon as the above decision of this court was announced the sheriff took precautions against any possible effort that might be taken to take the negro from prison.

The motion for a change of venue was overruled on March 9, 1912, 16 months after the homicide, 12 months

[Adams v. The State.]

after the first trial, and 2 months after the above decision of this court was rendered in the cause.

There appears to have been great popular passion and prejudice against the defendant, certainly for a time after the commission of the homicide; but the defendant, to entitle himself to a change of venue, was required by the law to show to the trial judge, by his application and the evidence in support of it, that *when* he made the application the situation in Montgomery county was such that he could not reasonably be expected to obtain a fair and an impartial trial.

The act approved August 26, 1909, entitled "An act to amend section 7851 of the Code of Alabama" (see Acts Special Session 1909, p. 212), provides that the refusal of an application for a change of venue may, "after final judgment, be reviewed and revised on appeal, and the Supreme Court shall reverse and remand or render such judgment on such application, as it may deem right, without any presumption in favor of the judgment or ruling of the lower court on said application."

This act, of course, emphasizes the legislative purpose to secure, if possible, a fair and an impartial trial for every one who is charged with the infraction of our criminal laws. It emphasizes the duty which rests upon trial courts and upon this court to see to it that infliction of criminal punishment shall be secured, not merely through the *forms* of law, but in accordance *with* the law. It does not, however, disturb the sound rule of law which declares that he who prays for a change of venue must reasonably satisfy the court that, at the time his application is acted upon, he is entitled to a change of venue.

The remarks of the trial judge to which we have above referred, made 12 months before the present application

[Adams v. The State.]

was acted upon, and which remarks found their way into the newspapers, may have been unfortunate as tending to confirm in the popular mind a belief of the defendant's guilt. The newspaper reports of the action of this court in reversing the first judgment of conviction may also have revived among the members of the bar and the people of the county a discussion of the defendant's case, and may have caused a fear on the part of the sheriff that there might be a revival of popular animosity against the defendant. Montgomery county is a large and populous county, and it is the seat of a large city, the capital of the state. Human experience indicates that *time* tends to allay the passions and to destroy the prejudices of individuals, and the words "cooling time" have found a legal definition.

In the case of *Godau v. State*, 179 Ala. 27, 60 South. 908, we carefully considered the question now under discussion. The opinion in that case fully sets out our views as to the rules which should govern trial courts when applications for a change of venue in criminal cases are made, and also the rules which should govern an appellate court when an appeal is taken from the order of a trial court refusing to grant such an application. It is not necessary for us to here repeat these rules; but, under the rules announced by us in that case, we are of the opinion that the trial court is not shown by this record to have committed error in refusing to grant the defendant a change of venue. The trial court might, we think, reasonably have concluded that the true situation was shown by the affidavits which were introduced by the state, and which tended to show that any prejudice which, at any time, had existed against the prisoner had subsided before the application for a change of venue was made; and that the popular mind was not, at that time, so impressed with the fact

[Jones v. The State.]

of the defendant's guilt as to render it reasonably apparent that the defendant could not be reasonably expected to obtain a fair and an impartial trial in Montgomery county.—*Godau v. State, supra*.

(2) In this case the defendant voluntarily appeared, was sworn, and testified as a witness. The court properly allowed him to be cross-examined by the solicitor.—*Clarke v. State*, 78 Ala. 474, 56 Am. Rep. 45.

We find presented by this record no matter, not already discussed, which is of sufficient merit to require discussion at our hands. The defendant has, through the entire history of his case, been represented by counsel who have ably and faithfully presented the facts of his case to this and to the trial court. The jury who tried the defendant, exercising the authority which the law conferred upon them, have said that the defendant shall suffer death. We find no error in this record, and can assign no legal reason why the judgment of the court below should not be executed.

Affirmed. All the Justices concur.

Jones v. The State.

Murder.

(Decided February 13, 1913. Rehearing denied March 17, 1913.
61 South. 434.)

1. *Indictment and Information; Name; Designation of Accused.*—An indictment should set forth the christian name of the defendant and not use initials and when initials only are used the indictment is subject to plea in abatement unless it is further alleged in the indictment that the name of the accused was otherwise unknown to the grand jury than as alleged.

2. *Same; Designation of Persons Slain.*—The use of initials instead of the christian name of the person alleged to have been slain, in an indictment for murder, does not render the indictment subject to demurrer or to plea in abatement, or create such a variance as will authorize the direction of the verdict for defendant.

[Jones v. The State.]

3. *Same; Defects; Waiver; Plea to Merits.*—After a defendant has pleaded to the merits, the indictment is not open to motion to strike, to demurrer, or to plea in abatement.

4. *Jury; Competency; Fixed Opinion.*—After a proper explanation of what constitutes a fixed opinion as to the guilt or innocence of a defendant, a juror who answered that he could not say that he had a fixed opinion, that he might not be able to do justice, that he had an opinion, but did not know whether it could be called a fixed opinion, and that he believed he could try the case fairly and impartially on the evidence and render an honest and fair verdict, was competent; so also was one who answered that he had a fixed opinion, but would be governed by the evidence in the case, and the evidence alone, and the law of the case as given him by the court.

5. *Evidence; Diagram.*—The purported diagram of the interior of the car in which a homicide was committed, as corrected by the testimony of the conductor, was admissible in evidence.

6. *Same.*—Where witnesses testified as to the diagram of the interior of the car in which the homicide was committed, but were not positive as to its correctness, and referred to it for the purposes of demonstration, but such diagram was not offered in evidence until verified and corrected by the testimony of the conductor, it was admissible, and it was for the jury to say whether it was correct, whether the correction of it was properly made, whether the testimony relative thereto was accurate and the extent to which they would be aided thereby.

7. *Same; Communications Signed by Deceased.*—The admission of a communication to a newspaper signed by deceased and others as to certain publications in the paper, without showing who wrote the communication, was not erroneous; it having been offered by defendant without objection on the part of the state, and was signed by deceased, together with others.

8. *Same; Opinion; Cross-Examination.*—Where defendant's mother as a witness for him had testified as to his mental condition, stating that he was crazy, it was competent to permit the state to prove by her that she had never made any attempt to have him adjudged insane or placed in an asylum, as much latitude is permitted on cross-examination for the purpose of ascertaining the credibility of the witness's testimony.

9. *Same; Expert; Sanity; Qualification.*—In order for a non-expert to be competent to express an opinion that a person is insane he must be shown to have had a continuous acquaintance with him of such intimacy as to enable him to form an accurate and trustworthy opinion as to his mental status.

10. *Same.*—Whether a non-expert is shown to have the qualifications sufficient to authorize him to give an opinion whether another person is insane, is a question addressed to the court in the exercise of a sound discretion, and not reviewable on appeal, except for palpable abuse.

11. *Same.*—Where the non-expert said that he had known defendant as a speaking acquaintance for about a year, and had known him intimately for about a month, but did not state the extent of their association except as to what happened during the three dif-

[Jones v. The State.]

ferent days of that time, the court properly ruled that such a witness did not have the proper qualifications to give an opinion as to the insanity of the defendant.

12. *Trial; Remarks of Court.*—Where a defendant offered a communication to a newspaper purporting to have been signed by the deceased, without showing by whom it was written, and the state interposed no objection to its admission, the remarks of the trial court that the state had consented for it to go in without objection as having been signed by this young man, that the court did not think the court would have permitted it to go in if there had been objection, but that it was in, and any further question as to deceased's connection with it was immaterial at that time, did not have the effect to so weaken or destroy the force of the evidence offered as to be reversible error.

13. *Witnesses; Corroboration; Previous Declarations.*—Where the mother of defendant had testified to the insanity of defendant, her declarations as to his insanity made to the father of defendant, were not admissible.

14. *Same; Examination and Cross.*—Where a witness for defendant had been examined at length by defendant, and then cross-examined by the State, whether or not the defendant will be permitted a re-direct examination as to matters provable on the direct examination is addressed to the discretion of the trial court, and will not be reviewed unless abused.

15. *Same; Scope.*—The number of persons who had told defendant about the reports claimed to have been circulated by deceased should have been brought out on the direct examination of defendant as a witness, the charge being murder and the defense insanity, and the court will not be put in error for declining to permit such testimony on the re-direct examination of defendant; especially where it appeared that it would have been a mere repetition of facts already stated.

16. *Appeal and Error; Harmless Error; Evidence.*—The exclusion of questions seeking a mere repetition of facts already stated by the witness is neither erroneous nor prejudicial.

17. *Constitutional Law; Right to Be Heard.*—Section 6 of the Bill of Rights is intended to guarantee to a defendant the right to have his case argued and properly presented to the court and jury by himself and by counsel, and does not authorize him to make a statement of facts outside the evidence. The right thus guaranteed must be exercised at the proper time and in the proper manner; hence, where a defendant had testified as a witness, he had no right to make statements not amounting to legal evidence until after the evidence was closed, and then if he wished to be heard he should claim that right during the time allotted to him, usually between the opening and closing arguments for the State.

18. *Homicide; Evidence; Declarations of Accused; Insanity.*—Where the prosecution was for murder, and the plea of insanity was offered, the defendant had the right to prove by his mother his acts and declarations tending to show his insanity, but that was a matter for direct examination.

[Jones v. The State.]

19. *Same*.—Where the defendant's theory was that remarks and reports about his wife had come to him so thick and fast shortly before the killing, that they affected his mental condition, and where he had testified as to things he had heard about her, the state, on its inquiry as to his mental responsibility, had the right to go into the facts, and the acts or conduct of defendant tending to refute his claim of insanity, and contradictory of facts claimed to be the cause of his insanity; hence, there was no error in permitting the state to ask him what he had said to third persons as to the hold he had on a certain man with whom his wife's name had been connected, or in permitting evidence of third persons as to previous conversations with defendant as to the rumors about his wife, and her relationship with another man.

20. *Same; Threats by Deceased*.—Where the prosecution was for murder defended on the theory of insanity induced by certain reports, and defendant had proved threats by deceased against him, it is competent for the state to introduce evidence of statements made by defendant indicating that he was on friendly terms with deceased, as tending to show either that he had not heard, or did not believe, that the reports had emanated from deceased.

21. *Same; Relevant Facts*.—In a trial for murder, it was not incompetent to permit a witness to state who composed a certain canning company with which defendant and several of the witnesses seem to have been connected.

22. *Same; Acts and Declarations of Accused*.—The acts, declarations and demeanor of accused, before or after the offense, are admissible against him, whether part of the *res gestæ* or not, but are not admissible for him unless part of the *res gestæ*.

23. *Same; Threats by Deceased*.—Until there was evidence tending to show that defendant acted in self-defense in committing the homicide, evidence of threats made by deceased against defendant was not admissible.

24. *Same; Insanity; Burden of Proof*.—Where defendant interposed the statutory plea of not guilty by reason of insanity as a defense to a charge of murder he has the burden of establishing the plea to the reasonable satisfaction of the jury, and a reasonable doubt is not sufficient.

25. *Same; Instructions; Character; Misleading*.—Charges asserting that testimony as to defendant's bad character was relevant only as affecting his credibility as a witness, and not as bearing on his guilt, and that evidence of his bad character could not be considered for the purpose of determining his guilt or innocence, were calculated to mislead the jury to the belief that, although they may not have believed the defendant's evidence, that fact should not influence them in passing on his guilt or innocence, and hence, were properly refused.

26. *Same; Province of Jury*.—A charge asserting that if defendant heard defamatory remarks by deceased against defendant's wife which destroyed defendant's free agency at the time of the offense, he was not guilty by reason of insanity, although he knew it was wrong at the time, and that it was not important whether deceased actually uttered such remarks or not, was properly refused in that

[Jones v. The State.]

it instructs without hypothesis that the effect of hearing such remark was to destroy defendant's free agency.

27. *Same.*—Where the charge was murder defended on the ground of insanity, a charge asserting that if one of defendant's progenitors was afflicted with insanity, by reason of which defendant inherited a diseased mind, and if defendant believed that deceased had made defamatory remarks about defendant's wife, and such belief, combined with any other cause, had entirely deprived him of will power at the time of the offense, defendant was not guilty, although he then knew that the act was wrong, was objectionable as singling out certain parts of the evidence, and was otherwise fully covered by given instructions.

28. *Same; Self-Defense; Peril.*—A charge that if there was reasonable doubt whether the circumstances were such as to impress the mind of a reasonable man that he was in danger of great bodily harm at the time of the killing, the jury must give him the benefit of the doubt, and acquit the defendant, pretermitted an honest or bona fide belief of the defendant, that he was in peril, and was properly refused.

29. *Same; Insanity.*—A charge asserting that insanity was not a stronger term than unsound mind, and did not import a greater degree of mental infirmity, but which did not define unsoundness of mind, or insanity such as would render a person irresponsible, was calculated to mislead the jury into believing that any unsoundness of mind amounted to insanity.

30. *Same.*—Where it appeared that defendant had ample time for cooling after hearing the reports about his wife, a charge asserting that if at the time of the killing he was affected by an illusion that deceased was responsible for the reports prejudicial to the character of his wife, that fact was to be considered in mitigation of the offense charged. pretermitted in hypothesis the fact that such illusion must have so affected him as to render him irresponsible, and was properly refused.

31. *Same.*—A charge asserting that if defendant at the time the homicide was committed was insane on the subject of defamatory remarks by deceased with regard to defendant's wife, and on the subject of a conspiracy by deceased with others to convict defendant of arson, he should be acquitted, provided such insanity overpowered his will, and his power to comprehend the consequences of his act, gave undue prominence to certain parts of the evidence, and was consequently objectionable.

32. *Same.*—Where the offense charged was murder, and the defense insanity, and there was no evidence that deceased had conspired with others to convict defendant of arson, a charge asserting that if defendant was insane on the subject of such conspiracy, he should be acquitted, was abstract.

33. *Same; Burden of Proof.*—A reasonable doubt as to whether defendant was sane or insane at the time of the killing does not require an acquittal, as the burden was on defendant to reasonably satisfy the jury of his insanity under his plea.

34. *Same; Degree.*—In a trial for murder defended on the plea of insanity induced by defamatory reports concerning defendant's

[Jones v. The State.]

wife, where ample cooling time had elapsed between the last report and the killing, a charge that if defendant was informed of the opprobrious language relating to his wife, spoken by deceased on the day of the killing, and he immediately and on the first opportunity shot deceased as the result of heated passion, cooling time had not elapsed, and he was only guilty of murder in the second degree, was properly refused.

35. *Same.*—The refusal of instructions that before the jury could convict, they must weigh the evidence, and that if they believed the defendant insane, their verdict must be guilty by reason of insanity, was not prejudicial to defendant.

36. *Charge of Court; Covered by Instructions Given.*—It is not error to refuse requested instructions covered by written instructions given.

37. *Same; Sufficiency of Evidence.*—A charge that before the jury could convict they must be satisfied to a moral certainty, not only that the proof was consistent with defendant's guilt, but that it was wholly inconsistent with every other rational conclusion, and that unless the jury were so convinced by the evidence of his guilt that they would venture to act upon that conviction, etc., was properly refused as argumentative.

APPEAL from Montgomery City Court.

Heard before Hon. ARMSTEAD BROWN.

Walter Jones was convicted of murder in the first degree, and he appeals. Affirmed.

The indictment charges the killing of S. Rowan, in the usual form, for murder in the first degree. The demurrers raise the questions that Rowan's true name is "Sloan Rowan," and is not set out. The application for change of venue was based upon the state of public mind, the action taken by the authorities and certain publications in the local papers, together with affidavits pro and con as to whether or not defendant could get a fair trial. When Bishop was being qualified as a juror, he answered: "I really cannot say that I have a fixed opinion. I might not be able to do justice. I have my opinion, but I don't know whether you call it a fixed opinion. I believe I could try the case fairly and impartially on the evidence, and render an honest and fair verdict." Roemer answered that he had a fixed

[Jones v. The State.]

opinion, but that he would be governed by the evidence in the case, and the evidence alone and the law given by the court.

The killing occurred on a car attached to the Western Railway train just before it left for Selma, and the diagram referred to in the opinion was a diagram of the car in which the killing occurred. When J. W. Brown was a witness, he was asked if he signed his name with reference to an article in the Advertiser as to the arson business in Lowndes county, and replied in the affirmative, whereupon the article referred to was shown him and introduced in evidence by the defendant. The article referred to deprecated the excitement and notoriety concerning certain burnings and their publication in the columns of the papers, and asserted that there was no excitement or unrest among the people of Benton. It was signed by S. Rowan and others, and it was shown that Rowan, not only signed it, but wrote it. The court remarked while the attorneys were objecting to the fact that Rowan signed it: "The state consented for it to go in without objection as having been signed by this young man. I don't think I would have admitted it, if put up to me on objection. It is in, that is all there is to it; but any further question as to Mr. Rowan's connection with it is immaterial at this time."

The following is the oral charge of the court excepted to: "In the trial of a homicide case, where the plea of not guilty and the statutory plea, plea of not guilty by reason of insanity, are both interposed, the burden of proof as to the first plea is upon the state to satisfy the jury beyond a reasonable doubt of the guilt of defendant; but, as to the second plea, the burden of proof is upon defendant to establish the plea of not guilty by reason of insanity to the reasonable satisfaction of the

[Jones v. The State.]

jury by a preponderance of the evidence, and a reasonable doubt is not sufficient to acquit the defendant under this plea. Hence it will be seen that, under these two pleas and issues, the burden of proof in the one case is upon the state and in the other upon the defendant. The weight and sufficiency of the evidence as to the one plea is that the state must satisfy the jury beyond a reasonable doubt; whereas, as to the other plea, the defendant must reasonably satisfy the jury by a preponderance of the evidence."

The following charges were refused to the defendant:

(3) "Testimony of defendant's character in this case is relevant only as affecting the credibility of the defendant as a witness, and not as having any bearing on defendant's guilt."

(4) "The evidence of the bad character of defendant cannot be considered by you in this case for the purpose of determining the guilt or innocence of defendant."

(24) "I charge you, gentlemen, that if you believe from all the evidence that the defendant heard from any source defamatory remarks of the deceased against his wife, that the effect of hearing such remarks was to destroy the free agency of the defendant at the time of the offense charged, then you must find defendant not guilty by reason of insanity, although defendant knew it was wrong at the time of the killing, and it is unimportant whether such remarks of the deceased were actually uttered or not."

(29) "Although you may believe from the evidence that defendant is a man of bad character, you cannot convict him because of these facts, but, before you can convict him, you must believe beyond a reasonable doubt from the evidence that defendant shot and killed Rowan under circumstances constituting murder or manslaughter."

[Jones v. The State.]

(30) "I charge you, gentlemen, that if you believe from the evidence in this case that one of defendant's progenitors was afflicted with insanity, that by reason of such insanity the defendant inherited a diseased mind, and that defendant believed that deceased had uttered the defamatory language against defendant's wife, and such belief, combined with any other cause, so disturbed defendant's mind as to suspend his will power entirely at the time of the offense charged, then you must find defendant not guilty by reason of insanity, and this is true, although defendant at the time of the killing knew the act was wrong."

(40) "If the jury have a reasonable doubt whether the circumstances were such as to impress a reasonable man's mind that he was in great danger of great bodily harm at the time of the killing, then they must give the prisoner the benefit of the doubt, and acquit him."

(55) "Before the jury can convict the defendant, they must be satisfied to a moral certainty, not only that the proof is consistent with defendant's guilt, but that it is wholly inconsistent with every other rational conclusion, and, unless the jury are so convinced by the evidence of defendant's guilt that they would each venture to act upon that decision in matters of highest concern and importance to his own interest, then you must find defendant not guilty."

(23) "The court charges the jury that insanity is not a stronger term than of unsound mind, and does not imply a greater degree of mental infirmity."

(18) "If the defendant was informed of the opprobrious language regarding his wife as uttered by the deceased upon the day of the killing of the deceased, and that the defendant immediately, and upon the first opportunity, shot and killed the deceased, the killing

[Jones v. The State.]

having been the result of heated passion, cooling time had not elapsed, and you cannot find the defendant guilty of an offense greater than murder in the second degree."

(35) "If the jury believe from the evidence that at the time of the killing of the deceased by the defendant the defendant was so affected by the illusion that Rowan was responsible for the dissemination of a report highly detrimental to his wife and her character, then they should consider that fact in regard to a mitigation of the offense charged in the indictment."

(36) "If the jury believe from the evidence that at the time of the consummation of the alleged homicide the defendant was laboring under a diseased condition of mind, that he was insane on the subject of the defamatory remarks made by deceased in regard to the wife of defendant, and on the subject of deceased and others having conspired to convict him of arson, and run him and his employees from his place of business in the town of Benton, then the jury should acquit the defendant, provided the jury believe from the evidence that such diseased condition of defendant's mind destroyed the power of defendant to comprehend rationally the nature and consequences of his act, and overpowered his will."

(50) "The court charges the jury that if you have a reasonable doubt in your mind arising out of the evidence as to whether defendant was sane or insane at the time of the killing, then it is your duty to acquit."

(E) "I charge you, gentlemen, that, before you can convict the defendant, you must weigh all the evidence in this case, and if, after considering all the evidence, you believe defendant is insane, your verdict must be guilty by reason of insanity."

[Jones v. The State.]

GEORGE E. GORDON, FRANK S. STONE, W. P. MCGAUGH, and LETCHER, McCORD & HAROLD, for appellant. The jurors Roemer and Bishop should have been excused for cause.—6 Mayf. 514. The court should have sustained the demurrer to the indictment, and have granted the motion in arrest of judgment because of errors therein.—*Benjamin v. State*, 25 South. 917; *Francois v. State*, 20 Ala. 83. The indictment was defective for not alleging the christian name of deceased.—*Morningstar v. State*, 52 Ala. 406; 1 Chity's Crim. Law 216; *Thompson v. State*, 48 Ala. 165; *Gerrish v. State*, 53 Ala. 476. The court erred in admitting the diagram of the car.—*Burton v. State*, 107 Ala. 108; *Wilkinson v. State*, 106 Ala. 23. The court erred in admitting the article in the newspaper alleged to have been signed by Rowan and others, and afterwards qualifying it as he did.—*Griffin v. State*, 90 Ala. 600; *Green v. State*, 96 Ala. 32; *Moon v. Crowder*, 72 Ala. 79; *Tolliver v. State*, 94 Ala. 112. The court erred in admitting evidence as to the acts and declarations of defendant after the shooting.—*Fonville v. State*, 91 Ala. 39; *Moore v. N. C. & St. L.*, 34 South. 619. It was not permissible for the state to go into the merits of the arson cases in Lowndes county.—*Carden v. State*, 84 Ala. 417. The court erred in not permitting the evidence of Wingfield as to the insanity of defendant.—*Parson's case*, 81 Ala. 577; *Boswell's case*, 63 Ala. 308; *Norris v. State*, 16 Ala. 776. The testimony of Pitts was not admissible, as no proper predicate was laid.—*Ex parte Livingston*, 61 South. 53; 61 South. 885. The defendant was entitled to make the statement offered by him outside the legal evidence.—Sec. 6, Bill of Rights, and authorities there cited. On the authority of *Burton's case*, *supra*; *Brown v. State*, 108 Ala. 118; *Beasley v. State*, 50 Ala. 149; 23 Cyc. 1112; 22 Cyc. 1113, and authorities there

[Jones v. The State.]

cited, it is insisted that the court erred in refusing the charges requested by defendant.

R. C. BRICKELL, Attorney General, W. L. MARTIN, Assistant Attorney General, and HILL, HILL, WHITING & STERN, for the State. There was no merit in the pleas, motions or demurrers addressed to the indictment.—*Thompson v. State*, 48 Ala. 165; *Franklin v. State*, 52 Ala. 414; *Crittenden v. State*, 134 Ala. 145; *Knight v. State*, 152 Ala. 56. If there was any merit in them they came after the plea to the merits had been interposed, and were consequently too late.—*Hubbard v. State*, 72 Ala. 164; *Smith v. State*, 142 Ala. 22. No error was committed in declining to excuse the jurors Roemer and Bishop for cause.—*Carson v. State*, 50 Ala. 134; *Reason v. State*, 72 Ala. 191; *Hamill v. State*, 90 Ala. 577; *Ragsdale v. State*, 134 Ala. 31; *Jarvis v. State*, 138 Ala. 117. The diagram of the car was properly admitted in evidence.—*Shook v. Pate*, 50 Ala. 91; *Burton v. State*, 107 Ala. 121; s. c. 115 Ala. 9. It was competent to show that deceased was a witness against defendant in the arson cases in Lowndes county, which was set for trial the Monday following the killing.—1 Mayf. 329. Counsel discuss the action of the court relative to the remarks made on the introduction of the newspaper article, and insist that they were without error.—*Meineke v. State*, 55 Ala. 47; *Schieffelin v. Schieffelin*, 127 Ala. 33. It is competent to show the acts, demeanor and expression either before, at the time of or after the homicide.—*Maddox v. State*, 159 Ala. 56; *Campbell's case*, 23 Ala. 79. The witness Wingfield was not shown to be qualified to give his non expert opinion as to the insanity of defendant.—*Parrish's Case*, 149 Ala. 42; *Braham v. State*, 143 Ala. 28. A defendant in taking the stand as a witness in his own behalf waives his con-

[*Jones v. The State.*]

stitutional protection, and may be required to stand a cross examination.—*Pate v. State*, 150 Ala. 17; Sec. 7894, Code 1907, and authorities there cited. Counsel discuss charges refused, and insist that they were properly refused either as being abstract, argumentative, covered by those given, or as incorrectly stating the law of insanity as a defense to murder.—*Parrish v. State*, 139 Ala. 50; *Parson v. State*, 81 Ala. 577; *Rose v. State*, 144 Ala. 116; *Parker v. State*, 51 South. 261; *Shelton v. State*, 144 Ala. 108.

ANDERSON, J.—An indictment which sets forth the defendant's Christian name by initials only is subject to plea in abatement, unless it is alleged that the Christian name was unknown to the grand jury otherwise than as laid in the indictment.—*Gerrish v. State*, 54 Ala. 476; *O'Brien v. State*, 91 Ala. 27, 8 South. 560; *Jones v. State*, 63 Ala. 28; *Lyon v. State*, 61 Ala. 229; *Wellborn v. State*, 154 Ala. 79, 45 South. 646. It is not so important, however, when individuals are only collaterally concerned in the act for which another is prosecuted—as for instance, those whose persons or property may have been affected thereby—that their names should be so fully and correctly stated, though they also ought to be. In the last class our court has held that it is permissible to charge the initial of the owner of the property affected or the person injured.—*Knight v. State*, 152 Ala. 56, 44 South. 585; *Knight v. State*, 147 Ala. 104, 41 South. 911; *Crittenden v. State*, 134 Ala. 145, 32 South. 273; *Lowe v. State*, 134 Ala. 154, 32 South. 273; *Gerrish v. State*, *supra*; and *Lyon v. State*, *supra*.

The designation of the party slain as "S. Rowan," instead of by his Christian name of "Sloan Rowan," did not render the indictment subject to a demurrer or plea

[Jones v. The State.]

in abatement, or create a variance available under the general charge.—*Franklin v. State*, 52 Ala. 414; *Knight's Case*, 147 Ala. 104, 41 South. 911.

Moreover, the indictment was not open to a motion to strike, a demurrer, or plea in abatement made or interposed after a plea to the merits.—*Hubbard v. State*, 72 Ala. 164; *Smith v. State*, 142 Ala. 22, 39 South. 329. Of course, there was no merit in the motion in arrest of judgment arising out of the point above discussed. It often occurs when answering on their voir dire as to their qualifications as jurors, or whether subject to challenge for cause, that persons do not understand the meaning of the question propounded, and are mistaken in their reply, which is demonstrated by an explanation by the court as to the meaning of the question, and a further answer by the juror, showing that he is competent, and thus qualifying his answers to the unexplained questions propounded to him by the court.—*Jarvis v. State*, 138 Ala. 17, 34 South. 1025; *Ragsdale v. State*, 134 Ala. 31, 32 South. 674; *Carson v. State*, 50 Ala. 134; *Hammil v. State*, 90 Ala. 577, 8 South. 380; *Beason v. State*, 72 Ala. 191.

We are of the opinion that the jurors Bishop and Roemer were not disqualified as disclosed by their final answers to the court after a proper explanation was made to them as to what constituted a fixed opinion as to the guilt or innocence of the accused.

There was no error in permitting the state to introduce in evidence what purported to be a diagram of the interior of the car in which the homicide occurred, as corrected by the testimony of the conductor, or which said correction was brought about by his testimony.

The other witnesses who testified as to said diagram were not absolutely positive as to the correctness of its every detail, and used and referred to it generally as a

[Jones v. The State.]

memorandum, and for purposes of demonstration, and it was not introduced in evidence until verified and corrected by the evidence of the conductor. The jury had the benefit of same with and without the said correction, and it was for them to say whether it was correct or not, or whether or not the correction was properly made upon same. The correctness of the diagram, as well as the accuracy of the testimony relative thereto, was a question for the jury, as was, also, the extent to which they were aided by said diagram.—*Burton v. State*, 115 Ala. 9, 22 South. 585; *Burton v. State*, 107 Ala. 121, 18 South. 284; *Shook v. Pate*, 50 Ala. 91.

It was competent for the state to show the previous relationship between the defendant and the deceased, and that deceased had been active in prosecuting him in an arson case, and had appeared and testified on the preliminary as a witness against him, as this showed a motive for wanting to get him out of the way, as well as ill will or malice.—*Hudson v. State*, 61 Ala. 333.

The trial court committed no reversible error as to the introduction of the communication signed by Rowan and other citizens of Benton as to certain publications of the Advertiser. It was offered by the defendant, and the state did not object to same, and it was signed by Rowan, together with others, and it mattered not who wrote it.

Nor do we understand that the remarks of the court operated to exclude this evidence in fact or in effect. The court did not, by the remark made, weaken or destroy the force of the evidence so as to bring this question within the influence of the case of *Griffin v. State*, 90 Ala. 596, 8 South. 670. The court merely questioned the admissibility of this evidence when offered by the defense, as there was no evidence, up to that stage of the trial, tending to show self-defense, and, while the

[Jones v. The State.]

state had the right to show animus on the part of the defendant towards the deceased, the defendant had no right to show animus or ill will on the part of Rowan towards him until there was evidence offered from which the jury could infer that Rowan was the aggressor, and which was not the case when this communication was offered; and the court merely questioned the admissibility of same, but let it in as the state had consented to same. Moreover, the communication in question made no allusion to the defendant; and if the same had been excluded, or its weight weakened by the remark of the court, it could have been of no damage to the defendant.

Nor did the trial court err in excluding any threats made by Rowan against the accused, until there was evidence tending to show that the defendant acted in self-defense.

The acts, declarations, and demeanor of an accused, before or after the offense, whether part of the *res gestæ* or not, are admissible against him, but unless a part of the *res gestæ* are not admissible for him.—*Maddox v. State*, 159 Ala. 53, 48 South. 689. The testimony of the witnesses Mullens, Beasley, and Mahaley, as to what defendant did immediately after the shooting, and that he was seen with another after getting off the train and appeared to be talking to him, tended to show, whether slight or strong, that there was a prearrangement of the homicide. The case of *Fonville v. State*, 91 Ala. 39, 8 South. 688, is not at all in point, and has no bearing on the present question. There was an attempt to show an assault by the defendant on another person at an entirely different time, and the court held that it had nothing to do with a prosecution for assaulting another person who was in no way connected with the other assault. The case of *Moore v. N. C. & St. L. R.*

[Jones v. The State.]

R. Co., 137 Ala. 495, 34 South. 617, was a civil case. Moreover, the acts and declarations there held to have been properly excluded were made by the plaintiff and offered by him. Of course, a party cannot prove his subsequent acts or conduct if not a part of the *res gestæ*, but this does not prevent the other party from doing so, when said acts or conduct are beneficial to the other party.

Much latitude is given upon cross-examination, and there was no error in permitting the state to prove by Mrs. Jones that she never made any attempt to have the defendant adjudged a lunatic, or placed in an asylum. She had previously testified as to his mental condition, and that he was crazy, and, being his mother, the fact that she had never made any effort or attempt to have him placed in an asylum was a fact to go to the jury, as affecting the credibility of her evidence as to the defendant's insanity.

Nor could the witness fortify her testimony by showing declarations that she made to her husband.

Upon the plea of insanity, the defendant had the right to prove by Mrs. Jones the acts and declarations of himself tending to show insanity, but the trial court will not be put in error for not letting counsel prove a fact on redirect which should have been brought out on the direct examination. Mrs. Jones had been examined at length by the defendant, and then cross-examined by the state, and the trial court did not err in refusing to allow her to be asked, by the defendant on redirect examination, "if she had heard Walter Jones say he was going wild."

While a nonexpert witness can give an opinion as to the sanity or insanity of a person, yet, in order for him to give his opinion that a person is insane, he must show an acquaintance with him of continuous intimacy, such

[Jones v. The State.]

as will enable him to form an accurate and trustworthy opinion as to the mental condition of the subject of inquiry.

Whether the qualification of the witness is sufficient is a question to be determined by the trial court, and the very nature of the test requires that its determination in particular cases be left to the sound discretion of the trial court, and which will not be revised on appeal, except for palpable abuse.—*Odom v. State*, 174 Ala. 4, 56 South. 914; *Braham v. State*, 143 Ala. 28, 38 South. 919; *Parrish v. State*, 139 Ala. 16, 36 South. 1012; *Ford v. State*, 71 Ala. 385. The witness Winfield said he had known the defendant to speak to him for about a year, and that he had known him intimately only for about a month, but he made no statement showing the extent of their association or contact with each other, except as to what happened during three different nights, and we are not prepared to say that the trial court erred in holding that this witness could not give an opinion that the accused was insane.

The last question to the defendant as to the number of persons who had told him about the reports sought, in substance, a mere repetition of facts already stated by the defendant. Moreover, it should have been brought out on direct, instead of the redirect, examination of the defendant as a witness.

There was no reversible error in permitting the witness to state who composed the Vandiver Canning Company, as the defendant and several of the witnesses seemed to have been connected with it.

The question to the defendant as to what he said to Pitts and Spivey as to the hold he had on Vandiver sought proper evidence, and was admissible without a predicate.—*Ex parte State, infra*, 61 South. 54. The defendant had testified as to things he had heard about

[Jones v. The State.]

his wife, and his theory was that these remarks and reports had come so thick and fast shortly before the killing that they affected his mental condition, and this inquiry of mental responsibility was far reaching, and the state had the right to go into any facts, acts, or conduct on the part of the defendant which tended to refute the claim of insanity, or which was contradictory of facts claimed to be the cause of said insanity in whole or in part. There was no error in permitting the evidence of Hood, Pitts, Spivey et al. as to previous conversations with the defendant as to the rumors about his wife, and her relationship with Vandiver.

It was also proper for the state to show statements by the defendant indicating that he was not on unfriendly terms with Rowan, as that had a tendency to show that he had not heard, or did not believe, that certain reports had emanated from Rowan. The defendant also proved threats made by Rowan against him, and these expressions of friendship towards Rowan tended to show that he had not heard of the threats claimed to have been made by Rowan, or did not believe them.

For a long time in this state an accused could not testify or make a statement of the facts, but the rule was relaxed some years ago so as to permit him to make a statement of the facts, but not under oath, and this statute was subsequently enlarged so as to permit him to testify under oath, upon his trial, like any other witness. Section 6 of the Bill of Rights, which provides that "in all criminal prosecutions, the accused has a right to be heard by himself and counsel, or either," does not relate to rules of evidence or authorize the accused to make a statement of facts outside of the evidence. We think that the real purpose of this provision of the Constitution is to guarantee to the defend-

[Jones v. The State.]

ant the right to have his case argued and properly presented to the court and jury by himself and counsel, one or both, but this right must be under the control of the rules of practice, and must be exercised at the proper time. In other words, under our rules and system, the argument of a case is made after the evidence is closed, and the trial court will certainly not be put in error for not permitting a defendant or his counsel to address the jury before the evidence is all in, or for not letting the defendant make a statement to the jury after the arguments on both sides are concluded.—*State v. McCall*, 4 Ala. 643, 39 Am. Dec. 314; *Blackburn v. State*, 71 Ala. 320, 46 Am. Rep. 323; *Beasley v. State*, 71 Ala. 329. The defendant had already availed himself of his right, under the existing law, to testify as a witness, and had no right to address the jury or make statements not amounting to legal evidence until after the evidence was closed. If he then wished to be heard by himself, as well as by his counsel, he should claim the right during the time allotted to him; that is, between the opening and closing arguments of counsel for the state.

The exception to the oral charge is without merit, as it was read from the case of *Parrish v. State*, 139 Ala. 50, 36 South. 1012, and was a correct statement of the law as to the burden of proof upon the plea of insanity.

Defendant's refused charges 3 and 4 were properly refused. If not otherwise bad, they were calculated to mislead the jury to the belief that, although they may not have believed the evidence of the defendant, this fact should not have influenced them in passing upon his guilt or innocence.

Charge 24, if not otherwise faulty, invaded the province of the jury, as it instructs, without hypothesis that

[Jones v. The State.]

the effect of hearing defamatory remarks about his wife was to destroy the defendant's free agency.

Charge 29, whether good or bad, was covered by given charge 1.

Charge 30 singles out and gives undue prominence to certain parts of the evidence. Moreover, the legal proposition attempted to be asserted is fully covered by given charges 17, 21, 32, and 33.

Charge 40, if not otherwise bad, pretermits an honest or bona fide belief on the part of the defendant that he was in peril.

Charge 55 was properly refused.—*Shelton v. State*, 144 Ala. 106, 42 South. 30, and cases there cited, and which overruled the case of *Brown v. State*, 118 Ala. 111, 23 South. 81, and also notes the overruling of *Burton v. State*, 107 Ala. 108, 18 South. 284, and *Brown v. State*, 108 Ala. 18, 18 South. 811. See, also, *Amos v. State*, 123 Ala. 50, 26 South. 524.

Charge 23 is bad, as the jury could have been misled into the belief that any unsoundness of mind amounted to insanity, and it neither defines such unsoundness of mind or insanity as will make a person irresponsible, and was calculated to confuse the jury.

Charge 18 was abstract, if not otherwise faulty, as cooling time had elapsed between the last report heard by the defendant and the homicide.

Charge 35 was bad. As said above, the defendant had ample cooling time after hearing the report, and before acting, and, if he was affected by the illusion that Rowan disseminated the report, it must have affected him so as to impair his reason and mental powers to the extent of rendering him irresponsible, and which said fact is pretermitted.

Charge 36 gives undue prominence to certain parts of the evidence, and it is also abstract, as there was no

[Jones v. The State.]

evidence that Rowan had conspired with others to convict the defendant of arson. Moreover, the defendant got the full benefit of same in given charges 17, 21, 32, and 33.

Charge 50 misplaced the burden of proof as to the plea of insanity.—*Parrish's Case, supra*.

The defendant was not injured by the refusal of charge "E." Moreover, it instructed an improper form of verdict.

We think that the preponderance of the evidence before the court, when passing upon the motion for a change of venue, showed that the defendant could get a fair and impartial trial. We do not think that the newspaper publications were such as to influence the public mind to such an extent as to prevent the defendant's getting a fair and impartial jury, and a fair and impartial trial.—*Godau v. State* 179 Ala. 27, 60 South. 908. The trial court did not err in refusing the defendant's motion for a change of venue.

While we have not commented upon every charge refused the defendant, it is sufficient to say that they were either faulty, or were covered by the given charges. Indeed, every point presented by the record has been considered, whether discussed in the opinion or not, and, finding no reversible error, the judgment of the city court is affirmed.

Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

[Bishop v. The State.]

Bishop v. The State.*Murder.*

(Decided April 10, 1913. 61 South. 820.)

1. *Homicide; Evidence; Difficulty Between Deceased and Another.*—Where the undisputed evidence showed that a difficulty between deceased and another was a contributing, if not the only cause of the fatal encounter between defendant and deceased, evidence of such difficulty was properly admitted.

2. *Same.*—Where deceased intervened in an attempt to quiet a disturbance at a picnic, and defendant intervened in behalf of his friend B., whom deceased was trying to quiet, and killed deceased, it was competent for a witness to testify as to what B. had in his hand at the time of the killing.

3. *Same.*—Under the circumstances of this case it was not error to permit a witness to testify as to the period intervening from the time he saw deceased with a stick until he saw him dead, as it was part of the *res geste*.

4. *Same; Illustration.*—It was not error to permit a witness to testify to and illustrate to the jury the relative positions of the deceased and the other parties to the fatal difficulty, and to state that he saw defendant lying on the ground.

5. *Witnesses; Examination; Leading Question.*—A question by defendant's counsel to a witness, referring to defendant, "who was after him?" was not improperly disallowed, as it was both leading and suggestive.

APPEAL from Houston Circuit Court.

Heard before Hon. H. A. PEARCE.

Zach Bishop was convicted of murder in the first degree, and he appeals. Affirmed.

E. H. HILL, for appellant. No brief reached the Reporter.

R. C. BRICKELL, Attorney General, and W. L. MARTIN, Assistant Attorney General, for the State.

MAYFIELD, J.—Appellant was indicted, convicted, and sentenced to life imprisonment for the murder of Lawson Sumler.

[Bishop v. The State.]

There is no error apparent of record which will authorize a reversal of the judgment. The evidence without dispute shows the killing as charged, and that it was effected with a deadly weapon. There is little, if any, evidence to show justification. Under the undisputed evidence in this case, it would be a glaring miscarriage of justice for the accused to be wholly acquitted. There were some tendencies of the evidence that might influence the jury in determining the degree of the offense; but we find none wholly in justification of the killing.

There was no error in the trial court's allowing the state to introduce proof of a difficulty between Lawrence Burline and deceased. The undisputed evidence shows that this difficulty between deceased and Burline was a contributing cause, if not the only cause, of the fatal encounter between defendant and deceased. Defendant seems to have voluntarily interfered in the difficulty and to have killed deceased in consequence of such interference. Moreover, the two difficulties constituted a continuous transaction; they were connected in such manner that each formed a part of the other.

There was no error in declining to allow the defendant's counsel to ask the witness Kennedy, "Who was after him?" referring to the defendant. The reason assigned to show error is that the answer would have tended to explain the defendant's flight. The question was highly leading and suggestive, even if the answer could be said to have been admissible under the undisputed evidence in this case.

The killing occurred at a church picnic at which there seem to have been general and numerous rows. The deceased intervened in an attempt to quiet the disturbances and to restore peace and order; and the defendant intervened in behalf of his friend, Lawrence Burline, whom deceased was trying to quiet or quell.

[Bishop v. The State.]

There was no error in allowing the witness Kennedy to testify as to what Burline had in his hand at the time of the fatal difficulty. Both the defendant and the state had theretofore introduced proof as to this fact, and there seems to be no conflict as to the proof.

There was no error in allowing the witness Saffold to testify as to the length of time intervening from the time he saw deceased with a stick until he saw him dead; it was a part of the fatal difficulty and really related to the *res gestæ* of the main question of dispute.

It was likewise not error for the court to allow this witness to testify and to illustrate to the jury the relative positions of the deceased and the other parties to the fatal difficulty. There was no error in allowing this witness to testify that he saw the defendant lying on the ground. The conduct, demeanor, and presence of the accused, during, shortly before, and after the fatal difficulty, is usually admissible in evidence by the state.

Each of the charges refused to the defendant was properly refused. Some of them were incomplete, some argumentative, some misleading, and some misstatements of the law in such cases.

Moreover, it affirmatively appears that the court, at the request of the defendant, in writing, charged the jury fully and fairly upon the law of this case. If any of the refused charges could be said to be correct, they were each fully covered by the given charges requested by the accused.

It clearly appears from this record that the accused has had a fair and an impartial trial, and we find no reversible error in the record.

Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

[Ex Parte Barlew.]

Ex Parte Barlew.***Murder.***

(Decided April 10, 1913. 61 South. 912.)

Courts; Supervisory Jurisdiction; Certiorari to Court of Appeals; Time.—Unless application for certiorari to review a decision of the Court of Appeals is made within fifteen days after final action, on application for rehearing by the Court of Appeals, the application for certiorari comes too late, and will be dismissed. (Supreme Court Rule 43.)

Certiorari to Court of Appeals.

Petition by Charles Barlew for writ of certiorari to review the decision of the Court of Appeals affirming the judgment of the trial court in the case of *Barlew v. The State*, reported in 5 Ala. App. 290, 57 South. 601. Application dismissed.

GEORGE E. BUSH, for appellant. No brief reached the Reporter.

R. C. BRICKELL, Attorney General, and W. L. MARTIN, Assistant Attorney General, for appellee. The petition was filed more than fifteen days after the final action of the Court of Appeals on petitioner's application for rehearing in that court, and hence, his petition for certiorari comes too late.—Rule 43, Supreme Court Practice.

MAYFIELD, J.—This is an application to this court for certiorari to review the decision and judgment of the Court of Appeals, affirming the judgment of the trial court convicting the petitioner of a criminal offense.

[Ex Parte Barlew.]

The application shows on its face that it is made too late, under the rule established by this court for reviewing the judgments of the Court of Appeals. The rule reads as follows: "This court will not in term time, nor will the justices thereof, in vacation, receive or consider an application for the writ of certiorari or other remedial writs, or process, for the purpose of revising or reviewing any opinions or decisions of the Court of Appeals, unless it appears from the face of the application that an application had been made to said Court of Appeals for a rehearing of the point or decision complained of, and that said application had been denied adversely to the movant, and the application to this court must be filed with the clerk of the Supreme Court within fifteen days after the action of said Court of Appeals upon the said application for rehearing. Nor will this court, or the justices thereof, entertain, consider or issue a writ of error, as authorized by section 1 of the Acts of 1911, page 449, unless the same is applied for within fifteen days after the rendition by the Court of Appeals of the judgment sought to be revised or corrected."—Rule 43, Supreme Court Pr., adopted April 4, 1912, (175 Ala. xx, 57 South. vi).

The judgment in question was rendered in the Court of Appeals, and the application for a rehearing of the cause therein was denied, nearly a year before the application was made to this court to review or revise that judgment. For this reason the application is denied.

Certiorari denied. All the Justices concur, except DOWDELL, C. J., not sitting.

[Simon v. The State.] .

Simon v. The State.*Murder.*

Decided April 8, 1913. Rehearing denied May 8, 1913.
61 South. 801.)

1. *Trial; Conduct; Power of Court.*—The trial judges should protect defendants in criminal cases from the acts of the prosecuting attorney which may tend to improperly influence the jury against them, and the court should, on its own motion, if necessary, discharge the jury.

2. *Same; Improper Conduct of Prosecutor.*—Where the improper question of the prosecuting attorney and his improper remarks were excluded by the court at the request of defendant, but the defendant did not move to discharge the jury and enter up a mistrial, this court cannot reverse the action of the trial court, however harmful the acts of the solicitor might have been; such matters cannot be reached by motion for new trial as the appellate court will not review the action of the trial court in passing on motions for new trials in criminal cases.

3. *Evidence; Exculpatory Declarations.*—Where a defendant was being prosecuted for killing his wife, the fact that five or ten minutes after the shooting defendant was heard to exclaim, "There, Lord, I have killed my wife, and it was not my intention to do it," and that while walking along the road thereafter, he was crying, was not admissible as part of the *res gestæ*, and were but exculpatory explanations.

APPEAL from Hale Law and Equity Court.

Heard before Hon. CHARLES E. WALLER.

Tom Simon, alias, was convicted of murder in the first degree, and he appeals. Affirmed.

JOSEPH H. JAMES, for appellant. The court erred in not vigorously applying its repressive powers to prevent such departure from legitimate argument as that indulged by the the solicitor in this case.—*Tannehill v. State*, 159 Ala. 52; *James v. State*, 170 Ala. 74; *B. R., L. & P. Co. v. Drennen*, 57 South. 881; *Florence C. & I. Co. v. Fields*, 104 Ala. 471. The mere direction to the jury not to regard such statements did not meet the

[Simon v. The State.]

case, and the court should have promptly granted defendant a new trial.—Authorities supra.

R. C. BRICKELL, Attorney General, and W. L. MARTIN, Assistant Attorney General, for the State. It is the universal rule in this state that the action of the trial court on a motion for new trial in a criminal case will not be reviewed by an appellate court.—*Ferguson v. State*, 149 Ala. 21, and numerous other cases. The question asked the defendant sought to elicit self-serving declarations and were not a part of the *res gestæ*.—*Weaver v. State*, 1 Ala. App. 48; *Stewart v. State*, 78 Ala. 436; *Dent v. State*, 105 Ala. 15; *Harkness v. State*, 129 Ala. 71.

DE GRAFFENRIED, J.—In this case the defendant was tried for and convicted of murder in the first degree, and was sentenced to death. There was ample evidence to justify his conviction of the offense, and, if the evidence against him is to be believed, the facts presented such a case as authorized the jury to impose upon him the highest penalty known to the law. It was, however, unfortunate that counsel for the state, in cross-examining the defendant while he was testifying as a witness in his own behalf, asked him a question which not only called for illegal and irrelevant testimony, but which question, without an answer, carried with it an inference which only tended to prejudice the jury against the defendant. It was also unfortunate that in his argument to the jury counsel for the state made a remark which was not only not authorized by the evidence, but which was calculated to inflame the jury against the defendant. When a great crime has been committed the law casts upon the solicitor grave responsibilities, and he realizes that the state looks large-

[Simon v. The State.]

ly to him to see that the perpetrator of such crime is properly and legally punished. In such a case, especially during the excitement of the trial, counsel on both sides sometimes unconsciously say things, and ask questions, which the strict letter of the law does not warrant. In the present case the solicitor had before him a case of great enormity, and was prosecuting a crime, the details of which were sufficient to arouse the indignation of all law-abiding men, and in such extreme cases counsel, as we have already said, are liable to forget themselves. The law—human and divine—is, however, the salt that has saved humanity from barbarism; and courts and officers of courts in their efforts to enforce the law, even in extreme cases, should, if possible, so guard their utterances that they may be sure that they themselves do not impinge the law which they are seeking to enforce.

In this case the trial judge sustained the objection of the defendant to the improper question to which we have above referred, and excluded from the jury the objectionable statement which, according to the record, was made by counsel for the state in his argument. The defendant did not move the court to discharge the jury and enter up a mistrial in the case on account of the above acts of counsel for the state. He did make a motion for a new trial which the court overruled, and we are not authorized to review the refusal of a trial court to grant a motion of a defendant in a criminal case for a new trial. The law places ample power in the hands of the trial judge to protect defendants in criminal cases from acts of any sort which may tend to improperly influence the jury against them; and no higher duty is imposed upon a trial judge than the duty which the law places upon him to discharge, upon motion, or even *ex mero motu*, a jury when, whether through in-

[Simon v. The State.]

advertence or intentional act, anything is done by any officer of the court without legal warrant which tends to improperly influence the jury. We are led to make the above remarks because the counsel for appellant in his brief complains bitterly of the above question and remarks, and of the action of the trial judge thereon. The trial judge excluded the remarks and refused to allow the objectionable question to be answered. Under our decisions the judgment in this case cannot be reversed because of the failure of the trial judge to discharge the jury or to grant a new trial; and we do not mean to intimate, by anything that we have above said, that this court possesses the authority to reverse the judgment of a trial court because of the refusal of a trial judge to grant the motion of a defendant in a criminal case to discharge a jury upon grounds similar to those which we have above discussed. That question is not presented by this record.

2. The court committed no error in refusing to allow the defendant to prove that five or ten minutes after the shooting the defendant was heard to say, "There, Lord, I have done killed my wife! and it was not my intention to do it." It is urged that this statement formed a part of the *res gestæ*, but we are plainly of the opinion that it did not. As shown by the evidence in this case, the facts were not, when the defendant made the above declaration, *speaking through* him as their *involuntary* mouthpiece. The statement was at best the narrative of a past transaction, and was exculpatory in its nature. The defendant in this utterance was simply making evidence for himself, and the court properly refused to allow the testimony. For the same reason the court properly refused to allow proof that the defendant tried to get a wagon to carry the body of his wife home, and that while walking along

[Ex Parte Livingston.]

the road, after the homicide, he was crying.—*Pitts v. State*, 140 Ala. 70, 37 South. 101; *Hill v. State*, 156 Ala. 3, 46 South. 864.

3. We have, as required by law, carefully examined this record, and find in it no reversible error.

The judgment of the court below is affirmed.

Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

Ex Parte Livingston.

Murder.

(Decided April 17, 1913. 61 South. 885.)

1. *Courts; Supervisory Jurisdiction; Certiorari; Writ.*—Where a relator could have advanced the same argument as to why the judgment of the Court of Appeals should have been sustained, on a writ of certiorari sued out by the state, he was not, after a reversal of that decision by this court entitled to a writ of certiorari to review the determination of the Court of Appeals affirming the judgment in accordance with the decision of this court.

2. *Certiorari; Nature of Writ; Right to.*—Certiorari is not a writ of right, and unless it is made so by the statute, it will not be granted except where substantial justice requires it.

CERTIORARI to Court of Appeals.

Petition by Morris Livingston for certiorari to Court of Appeals, to review the decision of that court, affirming the decision of the lower court in accordance with the decision of this court made in *Ex parte State, infra*, 61 South. 53. Petition denied.

WALTER NESMITH, J. C. MILNER, and KIRK, CARMICHAEL & RATHER, for appellant. Counsel discuss the merits of the petition with the insistence that there is manifest error in the admission of evidence, and the rulings made thereon by the Court of Appeals, as well

[Ex Parte Livingston.]

as their holdings on the propositions of law expressed in the opinion, and cite authorities to support their contention, but in view of the opinion it is not deemed necessary to here set them out.

R. C. BRICKELL, Attorney General, W. L. MARTIN, Assistant Attorney General, W. B. OLIVER, and M. T. ORMOND, for appellee. Counsel review the history of the case from the time of its first appeal to the Court of Appeals until the affirmance of the judgment of the lower court by the Court of Appeals in pursuance of the opinions rendered by the Supreme Court in the case of *Ex parte State of Alabama*, 61 South. 53, on application for rehearing, and in view of these facts, submit that the petition should be dismissed, and the court announce a limit to the applications which the parties may make, and the time when the decisions of the court upon these matters are final.

DE GRAFFENRIED, J.—In this case the defendant, Morris Livingston, was convicted of a felony, and appealed from the judgment of conviction to the Court of Appeals. The Court of Appeals, after considering the case, entered up a judgment reversing the judgment of the lower court. Thereupon the state, through the Attorney General, filed a petition in this court for a writ of certiorari in said case to said Court of Appeals, and upon a consideration of the said petition the writ of certiorari was granted, the judgment of the Court of Appeals was reversed, and the cause was remanded to that court for further proceedings in that court. Thereupon the Court of Appeals rendered a judgment in the cause, affirming the judgment of the lower court.

We have read the first opinion which was handed down by the Court of Appeals in this case, and in that

[Ex Parte Livingston.]

opinion that court discusses and decides adversely to the defendant every question which, in the present proceeding, the defendant presents to us. If, when this case was first before this court, the defendant was then of opinion that the rulings of the Court of Appeals of which he now complains were erroneous, he might then well have advanced the arguments which he now makes as reasons why the judgment of the Court of Appeals, reversing the judgment of the court below, should have been sustained. This the defendant did not do, and he now undertakes, by this proceeding, to obtain rulings from this court upon questions which it did not then consider, although, if there is any merit in any of the defendant's contentions, it might have then done so. This being the situation, we see no reason why this court should entertain the petition for the writ of certiorari.

A writ of certiorari is not a writ of right, until made so by statute. It will not be granted, unless *substantial* justice requires that it shall be granted.—*Independent Publishing Co. v. American Press Ass'n*, 102 Ala. 475, 15 South. 947. In our opinion, substantial justice does not require the granting of the writ prayed for in this case.

The writ of certiorari is therefore denied. All the Justices concur, except DOWDELL, C. J., not sitting.

[Ex Parte Woodward.]

Ex Parte Woodward.**Violating Prohibition Law.**

(Decided February 6, 1913. 61 South. 295.)

1. *Constitutional Law; Due Process; Rules of Evidence.*—Legislation providing that proof of one fact shall constitute prima facie evidence of the main fact in issue, where there is some rational connection between the fact proved and the fact presumed, and where it does not operate to preclude the presentation of the defense to the main fact, thus presumed, is not a denial either of due process of law, or the equal protection of the law, or trial by jury.

2. *Same.*—The provision of section 4, Acts 1909, p. 63, is not a denial of due process of law, notwithstanding the rule in this state that a person may not testify as to his uncommunicated motives, purposes or intentions; the relation between the presumption, and the facts and circumstances upon which it is predicated being natural and rational, and defendant being permitted to show facts and circumstances bearing on his motives, purposes and intent, and hence, not being deprived of his right to present his defense to the main issue.

3. *Same; Vested Rights; Intoxicating Liquors; Power to Control.*—There can be no vested right or unqualified, irrevocable privilege to traffic in intoxicating liquors, and the state may close all possible avenues through which its prohibition laws may be evaded or violated.

CERTIORARI to Court of Appeals.

Petition by M. E. Woodward for certiorari to the Court of Appeals to review the decision of that court, affirming the decision of the trial court in the case of *Woodward v. State*, 5 Ala. App. 202; 59 South. 688. Certiorari denied.

CALLAHAN & HARRIS, for appellant. Section 4, Acts 1909, p. 63, is violative of the Fourteenth Amendment of the Constitution of the United States, and of section 6, Constitution 1901.—*Bailey v. State*, 31 Sup. Ct. 145. The *Toole case*, 170 Ala. 41, furnishes the authority for all the decisions in the Alabama court for holding the

[Ex Parte Woodward.]

act constitutional, and the *Toole case* is based on the ruling in *Bailey v. State*, 161 Ala. 75, which case, on writ of error to the Supreme Court of the United States, was reversed, and hence, the authorities based upon it fall with it.—*Bailey v. State*, 219 U. S. 219. The effect of the rule of evidence is to deny due process of law.—1 L. R. A. (N. S.) 636; 7 Enc. of Evid. 596. The court erred in admitting the stub of the revenue license.—10 Enc. of Evid. 901; 17 Cyc. 337; 4 Wig. Sec. 2550; 8 Ark. 396; *Peebles v. Tomlinson*, 33 Ala. 337; 153 U. S. 109.

R. C. BRICKELL, Attorney General, and W. L. MARTIN, Assistant Attorney General, for the State. On the authorities cited, and on the opinion of the Court of Appeals in this case, the writ of certiorari should be denied.—*Woodward v. State*, 5 Ala. App. 202.

McCLELLAN, J.—Certiorari to the Court of Appeals.

The petitioner's adjudication of guilt by the Morgan county law and equity court, under an indictment charging that he sold, kept for sale, offered for sale, or otherwise disposed of, spirituous, vinous, or malt liquors, contrary to law, was affirmed by the Court of Appeals. *Woodward v. State*, 5 Ala. App. 202, 59 South. 688-690. The application for rehearing was denied by that court on July 11, 1912.

The petitioner assails the correctness of the rulings of that court underlying its affirmance of the judgment of conviction in several respects. The chief point taken is that error of law was committed in the ruling that section 4 of the Fuller Bill (Acts Sp. Sess. 1909, pp. 63, 64) was not constitutionally invalid.

The Court of Appeals is required by the act of its creation to conform its rulings to those pertinently pro-

[Ex Parte Woodward.]

nounced by this court.—1 Ala. App. 5, 6. In observance of this affirmative restriction upon its powers and functions, that court pronounced section 4 of the Fuller Bill constitutionally valid upon the authority of *Toole v. State*, 170 Ala. 41, 53, 54, 54 South. 195, delivered November 17, 1910, and denied rehearing January 14, 1911.

In *Toole v. State*, the judgment of this court, in the pertinent particular, was, in part, rested upon *Bailey v. State*, 161 Ala. 75, 49 South. 886. Upon writ of error the Supreme Court of the United States, on January 3, 1911, reversed the judgment of affirmance here entered on Bailey's appeal.—*Bailey v. State of Alabama*, 219 U. S. 219, 31 Sup. Ct. 145, 55 L. Ed. 191.

It is now contended for petitioner that the doctrine and conclusion of *Bailey v. Alabama*, 219 U. S. 219, 31 Sup. Ct. 145, 55 L. Ed. 191, not only destroys our deliverance in *Bailey v. State*, 161 Ala. 75, 49 South. 886, as authority, but also requires the conclusion that section 4 of the Fuller Bill is unconstitutional. It must be conceded, because of the reversal, that our conclusion in *Bailey v. State*, 161 Ala. 75, 49 South. 886, is no longer authoritative here. The question whether section 4 is constitutionally valid must be considered and determined without reference to our deliverance in *Bailey's Case*.

The act, approved August 25, 1909, in which section 4 is contained, has this title: "An act to further suppress the evils of intemperance, and to secure the obedience to and the enforcement of, and to prevent the evasion of, the laws of the state for the promotion of temperance and for the prohibition of the manufacture of and traffic in or unlawful disposition of prohibited liquors and beverages; to provide for the abatement of liquor nuisances and the seizure and destruction of

[Ex Parte Woodward.]

forfeited liquors and beverages, and to prescribe the procedure in such cases." Section 4 is as follows: "4. That the keeping of liquors or beverages that are prohibited by the law of the state to be manufactured, sold or otherwise disposed of in any building not used exclusively for a dwelling shall be prima facie evidence that they are kept for sale or with the intent to sell the same, contrary to law." The provisions of this act accord with the general and particular purposes foreshadowed in its title.

The act to which this act, approved August 25, 1909, is a complement was approved August 9, 1909.—Acts Sp. Sess. 1909, pp. 8-13. Its title reads: "An act to promote temperance and suppress the evils of intemperance; to discourage the use and consumption of alcohol, alcoholic, spirituous, vinous, malt, brewed, and fermented liquors and other liquors, liquids, bitters and beverages defined and set forth in the act, and substitutes or devices therefor, and to prohibit the manufacture, sale, offering for sale, keeping or having in possession for sale, barter, exchange, giving away, furnishing or otherwise disposing of the said liquors, liquids and beverages, the carrying on of the business of a brewer, distiller, rectifier of spirits, or retail or wholesale dealer in liquors, or retail or wholesale dealer in malt liquors, and the keeping or maintaining of unlawful drinking places, which are declared to be common nuisances and are to be abated as such."

Its third section provides in part: "That it shall be unlawful for any person, firm, or corporation or association within this state to manufacture, sell, offer for sale, keep or have in possession for sale, barter, exchange, give away, furnish at public places or elsewhere, or otherwise dispose of, the prohibited liquors and bev-

[Ex Parte Woodward.]

crages described in section 1 of this act, or any of them, in any quantity," etc.

Latterly in that act a penalty of fine or imprisonment, or both, is prescribed for its violation.

The title, just quoted, correctly indicates the substance of the act of which it is a part.

This general doctrine, expressed for the Supreme Court by Justice LURTON in *Mobile, etc., R. R. Co. v. Turnipseed*, 219 U. S. 42, 43, 31 Sup. Ct. 136, 137 (55 L. Ed. 78, 32 L. R. A. [N. S.] 226, Ann. Cas. 1912A, 463), must be accepted as long since settled: "Legislation providing that proof of one fact shall constitute prima facie evidence of the main fact in issue is but to enact a rule of evidence, and quite within the general power of government. Statutes, national and state, dealing with such methods of proof in both civil and criminal cases abound, and the decisions upholding them are numerous. * * * That legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law, it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under the guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed. If a legislative provision, not unreasonable in itself, prescribing a rule of evidence, in either civil or criminal cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him."

[Ex Parte Woodward.]

In *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 81, 82, 31 Sup. Ct. 337, 342 (55 L. Ed. 369, Ann. Cas. 1912C, 160), it is said (Justice Van Devanter writing for the court): "Each state possesses the general power to prescribe the evidence which shall be received and the effect which shall be given to it in her own courts, and may exert this power by providing that proof of a particular fact, or of several taken collectively, shall be prima facie evidence of another fact. Many such exertions of this power are shown in the legislation of the several states; and their validity, as against the present objection, has been uniformly recognized, *save where they have been found to be merely arbitrary mandates, or to discriminate invidiously between different persons in substantially the same situation.*—*Bailey v. Alabama*, 219 U. S. 219, 238 [31 Sup. Ct. 145, 55 L. Ed. 191]; *Board of Commissioners v. Merchant*, 103 N. Y. 143, 148 [8 N. E. 484, 57 Am. Rep. 705]." (Italics supplied.) The court then quotes approvingly a pertinent excerpt from its opinion in *Mobile, etc., R. R. Co. v. Turnipseed*, *supra*.

Where the statute is expressive of the legislative power defined by the Supreme Court in the decisions quoted, and does not transgress the limitations for a constitutional exertion of that power, prescribing only a temporary, as distinguished from a conclusive, inference of fact from a fact or facts or circumstances proved, no impairment of constitutional right is effected; nor is any provision of either the state or federal Constitution thereby violated. The protective guaranties of *due process of law* and of the *equal protection of the law* and of the *right to trial by jury* are not infringed by such a statute.—*People v. Cannon*, 139 N. Y. 32, 34 N. E. 759, 36 Am. St. Rep. 668; *Board of Commissioners v. Merchant*, 103 N. Y. 143, 8 N. E. 484, 57 Am. Rep.

[Ex Parte Woodward.]

705, cited in *Lindsley v. Carbonic Gas Co.*, *supra*; *State v. Buck*, 120 Mo. 479, 25 S. W. 573; *State v. Kingsley*, 108 Mo. 135, 18 S. W. 994; *State v. Beach*, 147 Ind. 74, 43 N. E. 949, 46 N. E. 145, 36 L. R. A. 179; *Commonwealth v. Williams*, 72 Mass. (6 Gray) 1; *State v. Cunningham*, 25 Conn. 195; 2 Woollen & Thornton on Intox. Liquors, § 923, and notes; *Goldstein v. Maloney*, 62 Fla. 198, 57 South. 342; Joyce on Intox. Liquors, § 44.

The legislative power being as stated, the real question is: Does section 4 evidence an invalid exercise thereof?

While not a literal copy of section 2427 of the Code of 1897 of Iowa, sections 4 and 5 of the Fuller Bill manifest an identity of ideas therewith, and, for all practical purposes, express them in similar language. That statute, in the particular with which we are now concerned, was pronounced valid in *Santo v. State*, 2 Clarke (Iowa) 165, 212-214, 63 Am. Dec. 487, delivered in 1855, anterior, of course, to the adoption of the fourteenth amendment.

A number of other states have had, or have now, substantially similar statutes. Some of them are Kansas, Nebraska, Connecticut, New York, and Vermont. The principle to which such enactments are referable has been illustrated in numerous instances, other than with respect to the traffic in liquors, where the legislative purpose was to exert the police power.

If unaffected by the rule of evidence, to be later stated, prevailing in this state, reason and the following authorities, in addition to the general doctrine and its limitations before quoted from the *Turnipseed* and *Lindsley Cases*, admit of no doubt of the validity of the section under consideration.—*State v. Barrett*, 138 N. C. 630, 50 S. E. 506, 1 L. R. A. (N. S.) 626, and note;

[Ex Parte Woodward.]

Toole v. State, *supra*; *People v. Cannon*, 139 N. Y. 32, 34 N. E. 759, 36 Am. St. Rep. 668, and note on pages 6-84; *Commonwealth v. Williams*, 72 Mass. (6 Gray) 1; *State v. Cunningham*, 25 Conn. 195; *Parsons v. State*, 61 Neb. 244, 85 N. W. 65; *Durfee v. State*, 53 Neb. 214, 73 N. W. 676; *State v. Sheppard*, 64 Kan. 451, 67 Pac. 870; *State v. Intox. Liquors*, 109 Iowa, 145, 80 N. W. 230; *Lincoln v. Smith*, 27 Vt. 328, 354, et seq.; *Joyce on Intox. Liquors*, § 672; *Board of Commissioners v. Merchant*, 103 N. Y. 143, 8 N. E. 484, 57 Am. Rep. 705; *Woollen & Thornton on Intox. Liquors*, § 923; 11 Ency. Law (2d Ed.) p. 551.

Our rule of evidence, to which allusion has been made, is that a person may not testify as to his uncommunicated motives, purposes, or intention; and in *Bailey v. Alabama*, 219 U. S. 228, 31 Sup. Ct. 145, 55 L. Ed. 191, it was said this rule of evidence would be read into the statute there under consideration. And it was accordingly ruled that the statute there in question constituted, in reality, a sufficient warrant for conviction of an accused of the "mere breach of a contract for personal service, coupled with the mere failure to pay a debt which was to be liquidated in the course of such service"; or, as otherwise therein stated: "We cannot escape the conclusion that, although the statute in terms is to punish fraud, still its natural and inevitable effect is to expose to conviction for crime those who simply fail or refuse to perform contracts for personal service in liquidation of a debt, and, judging its purpose by its effect, that it seeks in this way to provide the means of compulsion through which performance of such service may be secured," etc.

In the evident effort to constrict the ruling there made to an unambiguous status of statutory purpose and effect, it was said, "The point is that in such case

[Ex Parte Woodward.]

the statute *authorizes* the jury to convict," the basis of such authorization being found by the court in the before-quoted conclusion from the statute of two facts only, viz., (a) mere breach of a contract for personal service, and (b) a mere failure to pay a debt in the course of that service, from which the court concluded that an unconstitutional means was thereby afforded to compel the performance of the contract.

It is clear that the court did not intend to enlarge the limitations, with respect to statute-created presumption, stated in the *Turnipseed Case*, *supra*, which is cited approvingly in *Bailey's Case*, nor to lay down a different rule from that expressed in the subsequently delivered *Lindsley Case*, *supra*. From the whole opinion in the *Bailey Case* it appears with satisfactory certainty that the majority of the Supreme Court considered the *status* involved in Bailey's prosecution, viz., a contract for personal service, as a controlling factor in the ruling there made. This *status*, manifestly different from that section 4 presents, obviously quickened the sensibilities of that tribunal to a condition which, to penalize as there analyzed, trenched unjustly upon the natural right, not only to contract for personal service, but to be free from the imposition of a penalty for the mere failure to discharge a debt created by the contract for personal service. Much weight, in attaining this judgment, was given the law of this state, as pronounced under the statute before the now avoided amendment, in *Ex parte Riley*, 94 Ala. 82, 10 South. 528.

The status to which section 4 relates is not, of course, affected by the consideration so potent in the decision of *Bailey's Case*. It is a part of a system expressive of the state's conceded police power in respect of the traffic in liquors, which the state has condemned as harm-

[Ex Parte Woodward.]

ful to peace, health, safety, and morals. In such a traffic, whether large or small, no one has or can have a vested right or an unqualified, irrevocable privilege.—*Foster v. Kansas*, 112 U. S. 201, 5 Sup. Ct. 8, 97, 28 L. Ed. 629; *License Cases*, 5 How. 504, 577, 12 L. Ed. 256; *State v. Skeggs*, 154 Ala. 249, 265, 46 South. 268. That all possible avenues through which prohibitory laws of this character may be evaded or violated may be closed, and thereby evasion and violation of the major legislative purpose prevented, is generally accepted.—*Feibelman v. State*, 130 Ala. 122, 30 South. 384.

In aid of the effectuation of the major legislative intent to prohibit the unlawful traffic in liquors, and thereby render more difficult the forbidden commerce, it was obviously reasonable to statutorily impute to the keeping of such liquors at any other place than a "building not used exclusively for a dwelling" the presumptive, nonconclusive, result that such liquors were "kept for sale or with the intent to sell the same," in violation of law.

Taking section 4 as having read into it our stated rule of evidence, is *due process of law* in fact or in effect denied one so accused?

Without the stated rule of evidence, there can be no well-founded contention that section 4 is constitutionally invalid; and, on the other hand, it is not and cannot be soundly asserted that, alone, the stated rule of evidence offends any constitutional provision, federal or state. Does their blending deny *due process of law*?

In so far as the present inquiry, with its circumstances, concerns this court, due process of law is afforded one accused if he is accorded a fair opportunity to explain and contest the charge brought against him; and the rule is not arbitrary in character.—8 Cyc., pp.

[Ex Parte Woodward.]

1090, 1091; *Goldstein v. Maloney*, 62 Fla. 198, 57 South. 342; *Lindsley v. National Carbonic Gas Co.*, 220 U. S. 61, 31 South. 337, 55 L. Ed. 369, Ann. Cas. 1912C, 160. That the stated statutory presumption, when complemented by the stated rule of evidence, is not *arbitrary* is apparent. The relation between the facts and circumstances upon which the statutory presumption is predicated and the merely prima facie presumption thus established is rational and natural. There is between such facts and circumstances and the merely prima facie presumption thus raised no such hiatus, in reasonable sequence, as indicates an arbitrary pronouncement of conclusion in support of the main fact.—*Commonwealth v. Williams*, 72 Mass. (6 Gray) 1; *State v. Barrett*, 138 N. C. 630; 50 S. E. 506, 1 L. R. A. (N. S.) 626, and note thereto.

Our rule of evidence simply and generally closes the mouths of witnesses, whether parties or not, to declare, in chief, their uncommunicated motives, purposes, or intents. It does not impair or qualify the utmost freedom to show *facts* and *circumstances* relevant to issues involving motive, purpose, or intent. One accused of the offense of which petitioner was adjudged to be guilty may introduce, in negation of the mere prima facie presumption the statute (section 4) raises, every fact and circumstance attending or relating to the *keeping* of the forbidden liquors in the place other than a building used exclusively for a dwelling. The sole, whole effect of the rule of evidence, in such cases, is to deny the accused the right to enter a bare denial of his intent in so keeping the forbidden liquors. The presumption is evidential only. It is not conclusive. The jury is not bound to accept it as showing guilt. The jury may disregard it and conclude to innocence. The quantity of the liquors so *kept* by the accused may be

[Ex Parte Woodward.]

so inconsequential as to entirely negative any notion that it was kept with unlawful intent, or it may be the liquors so kept were for some legal, personal use manifestly inconsistent with an unlawful intent; in any of which events the accused may show, by himself or otherwise, circumstances or facts tending to refute the presence of an unlawful intent in the premises. Having such unrestricted, reasonable opportunity and means, under the laws of this state, of making defense to such a charge by showing relevant facts and circumstances in negation of the intent so imputed, no constitutional right of the accused is violated in the denial, to all of the class in which he is, to assert that in so *keeping* the forbidden liquors he entertained no unlawful intent in the premises; and *Bailey v. Alabama, supra*, does not conclude to the contrary.

In conclusion on this point, and in response to the suggestion that the presumption raised by section 4 would, upon occasion, impute to wholly innocent conduct an unlawful intent in the premises, we cannot do better than quote (omitting the numerous citations made) the language of the Supreme Court (Justice Hughes writing) in *Purity Extract & Tonic Co., et al. v. C. C. Lynch*, 226 U. S. 192, 201, 33 Sup. Ct. 44, 46 (57 L. Ed. —), delivered December 2, 1912: "It is also well established that, when a state, exerting its recognized authority, undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary, in order to make its action effective. It does not follow that because a transaction, separately considered, is innocuous it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government. * * *

[Hamner v. Freeman.]

With the wisdom of the exercise of that judgment the court has no concern; and, unless it clearly appears that the enactment has no substantial relation to a proper purpose, it cannot be said that the limit of legislative power has been transcended. To hold otherwise would be to substitute judicial opinion of expediency for the will of the Legislature—a notion foreign to our constitutional system.”

We have reconsidered the rulings of the Court of Appeals upon the question raised by timely objections to the introduction in evidence by the state of “a paper termed a stub of a revenue license,” and of the certificate, by the internal revenue collector of Alabama, authenticating said stub, of which he was the custodian. Our opinion accords with that attained by the Court of Appeals on these matters.

The petition is denied. All the Justices concur.

Hamner v. Freeman.

Bill for an Accounting to Declare Deeds Void and to Fasten a Lien.

(Decided January 23, 1913. Rehearing denied February 14, 1913. 61 South. 106.)

1. *Homestead; Vacation of Fraudulent Conveyance.*—The right of a debtor to assert a waiver of exemptions in the land is not affected by the vacation of a conveyance as being in fraud of the debtor's creditors.

2. *Exemptions; Waiver.*—Where the complaining creditor's judgment contains a waiver of exemptions as to personal property, and the machinery on the land was treated by the debtor as personalty, a vacation of a conveyance of the land, including a mill with a boiler, engine, etc., located thereon as being in fraud of complainant's judgment, had the effect of rendering such machinery subject to complainant's claim.

3. *Appeal and Error; Objections; Time; Waiver.*—Where a decree was entered vacating a conveyance as being in fraud of a judgment

[Hamner v. Freeman.]

held by the complainant, an objection that complainant did not prove the assignment of the judgment to him cannot be taken by the debtor where it appears of record that objections were not filed until the conclusion of the chancery term, and after the submission of the cause, and where the note of submission does not show a submission on such objection, and they were not noticed in the decree.

APPEAL from Tuscaloosa Chancery Court.

Heard before Hon. A. H. BENNERS.

Bill by S. M. Freeman against J. D. Hamner, Sr., and others, to declare certain deeds void, for an accounting, and to declare a lien in favor of complainant upon certain property. Decree for complainant, and respondent named appeals. Corrected and affirmed.

The case made by the bill is that in the year 1907 J. D. Hamner, Sr., was indebted in a large sum to the firm of Sloan & Freeman, composed of orator and E. F. Sloan, and that the firm affairs at that time were in the hands of George A. Searcy as receiver, who in that capacity filed a suit against Hamner on said indebtedness to Sloan & Freeman, and on the 27th day of January, 1908, recovered a judgment against said Hamner in the sum of \$1,254.47, together with the costs, said judgment containing waiver of exemptions as to personal property. Execution was issued on the judgment, returned "not satisfied," and on July 15, 1909, a certificate of said judgment was issued and recorded in the probate office of Tuscaloosa county. It is alleged that complainant was the owner of said judgment, and that the same is still due and unpaid. The bill further shows that at the time of the filing of the suit by the receiver Hamner was seised in fee of 263 acres of land which is described by government subdivisions, and that he was also owner of a mill and gin, boiler, and engine located on said land, which is substantially all of the property owned by said Hamner, and that on the 2d day of December, 1907, after the filing of the suit by

[Hamner v. Freeman.]

Searcy as receiver, the said J. D. Hamner, Sr., and his wife executed two certain deeds reciting a consideration of \$200 in each, whereby they conveyed all of the above-mentioned land to their two sons, D. W. and J. D. Hamner. It is alleged that D. W. Hamner is dead, and has left surviving him a wife, now Mrs. Ida Graham, and three minor sons, whose names and ages are set out. It is then alleged that, notwithstanding the consideration expressed in the deed, no money was paid as an incident or inducement thereto, and that the conveyances were voluntary, wholly without consideration, and made for the purpose of hindering, delaying or defrauding the creditors of said J. D. Hamner, Sr. It is also alleged that, if it be true that the consideration named was paid, it was grossly inadequate, and that the property was reasonably worth \$2,500. And that these facts were well known to the parties to the conveyances, and that each and all of said parties in making said conveyances purposed and intended to place the property beyond the reach of the judgment hertofore set forth. The bill also alleges that in the making of the contract there was a private agreement between the grantors and grantees as a part of the consideration that the grantors should receive the benefit of the fruits, increase and use of said property thereafter, and should have a right to use said homestead after that time. Answer was interposed denying the allegations of the bill, and also setting up that a part of the land was a homestead, and that, therefore, complainants cannot complain, and the bill sets out the particular subdivisions constituting the homestead, and alleges it not to exceed in area 160 acres and in value \$2,000.

JONES & PERSONS, for appellant. Counsel insist that complainant was not shown to have any legal title to

[Hamner v. Freeman.]

the judgment rendered in favor of George A. Searcy, receiver, and, therefore, not entitled to recover in this case. They further insist that the evidence was not sufficient to authorize the setting aside of the conveyance, and that the debtor was entitled to claim his exemptions.—*Kennedy v. First Nat. Bank*, 107 Ala. 170.

P. B. TRAWEEK, for appellee. The conveyance was without question fraudulent and void, and the court properly so decreed.—*Allen v. Caldwell*, 145 Ala. 209; *McKee v. West*, 141 Ala. 532. Nothing like a resulting trust resulted to the sons, as that can arise only when the purchase money is paid at or before the time of the conveyance.—*Haney v. Legg*, 30 South. 35; *Gilbreth v. Farrow*, 147 Ala. 183; 138 U. S. 592; 165 U. S. 352. The judgment was unquestionably a lien on the property.—54 South. 532; 52 South. 388; Sec. 4157, Code 1907. There are a great many objections that would prevent the claim of exemptions sought to be imposed.—Sec. 4168, et seq., Code 1907; 74 Ala. 460; 13 South. 782. Respondent denied all title to the land, and certainly could not have a homestead thereon.—*Winston v. Hodges*, 102 Ala. 304. The mill, etc., were real estate, and were situated outside of the 160 acres claimed as a homestead, and hence, was not subject to exemptions.—*Tiedman on Real Property*, sec. 4; *Weir v. Clayton*, 19 Ala. 132. The judgment contained waiver of exemptions, and hence, if the machinery be treated as personal property, it would be subject to the judgment.

ANDERSON, J.—We are disposed to agree with the chancellor to the effect that the deeds from the appellant to his sons were inoperative, as against this complainant, but do not agree that all of the property conveyed was liable to the complainant's demand. The

[Hamner v. Freeman.]

undisputed evidence shows that Hamner, Sr., resided on this land, and 160 acres of the same was subject to his claim of homestead exemption. The chancery court, therefore, erred in holding that complainant had a lien upon all of the property. As a general rule, a conveyance of a homestead cannot be fraudulent against creditors, whether the conveyance be to the wife or to a third person, since they have no recourse against it.—*Steiner v. Berney*, 130 Ala. 289, 30 South. 570; *Talladega Bank v. Browne*, 128 Ala. 557, 29 South. 552. And, although there are cases which uphold the contrary doctrine, nevertheless, the homestead right, according to the great weight of authority, is not forfeited by such transfer or attempted transfer. There may be a bad motive, but there is no illegal act. A fraudulent conveyance does not enlarge the rights of creditors, but merely leaves them to enforce their rights as if no conveyance had been made.—20 Cyc. 283, 284. When a debtor has conveyed to third persons land, including his homestead interest, to hinder, delay, and defraud his creditors, and such conveyance has been set aside and avoided at the suit of creditors, such debtor then has the same right to assert his homestead exemption against such creditors as he would have had if the conveyance had never been executed by him.—*Kennedy v. First National Bank*, 107 Ala. 170, 18 South. 396, 36 L. R. A. 308; *Id.*, 113 Ala. 283, 21 South. 387, 36 L. R. A. 308; *Yates v. Adams*, 119 Ala. 247, 24 South. 547, 72 Am. St. Rep. 910. The appellant here interposed his exemption claim during the progress of the cause and before there was a decree or order of condemnation, and which was seasonably asserted, and which fact avoids one of the points upon which the court was divided in the *Kennedy Case*, *supra*, as the claim there did not come until after a decree directing a sale of the land.

[Hamner v. Freeman.]

The complainant's judgment contained a waiver of exemptions as to personal property, so the engine, boiler, etc., which was treated by the grantor as personal property was not exempt and was subject to the complainant's claim. On the other hand, if a fixture, so as to be a part of the realty, it seems to be located on the part of the land not embraced in the homestead claim.

It is suggested by the appellant that the complainant is not the owner of the Searcy judgment, or, rather, that he did not prove the execution of his assignment of same; and that he objected to same as evidence. The court convened on May the 6th, and the decree recites that the cause was submitted in term time for a decree in vacation. The chancery court term is one week, so the case must have been submitted before the 14th of May, yet the respondent's objections were not filed until the 14th of May, and after the submission of the cause, and this conclusion is borne out by the fact that the note of submission does not affirmatively show a submission on the objections, and from the further fact that they are not noticed in the decree.

The chancery court properly subjected all property, other than the homestead, to the complainant's demand, but erred in disallowing the appellant's homestead exemption claim, and in subjecting all the property to the satisfaction of the said judgment. The decree of the chancery court is corrected so as to exclude the land set out in the exemption claim, and is in other respects affirmed, and the cost of this appeal is taxed against the appellee.

Corrected and affirmed.

DOWDELL, C. J., and MAYFIELD and DE GRAFFENRIED, JJ., concur.

[Minchener v. Henderson.]

Minchener v. Henderson.***Bill to Annul a Mortgage as Security for Husband's Debt.***

(Decided February 6, 1913. 61 South. 246.)

1. *Fraudulent Conveyances; Evidence; Sufficiency.*—Where the respondent filed a cross bill to cancel a deed from respondent's debtor to the debtor's wife, which deed conveyed a certain lot as a gift, in answer to a bill by the wife to declare a mortgage on said lot void as security for the husband's debt, the evidence was sufficient to sustain the finding that prior to the conveyance by the debtor to his wife he had agreed to give the creditor a mortgage on the lot for money advanced by the firm composed of the debtor and creditor, to enable the debtor to build a house on said lot.

2. *Same; Pleading; Variance.*—Where there was no variance between the allegations of the cross bill, and the evidence on the controlling issue as to whether a deed from the debtor to his wife was fraudulent, the fact that there were variances between the pleadings and proof as to other distinct equities in the case, could not have the effect to deprive the creditor of the right to a cancellation of the deed.

3. *Frauds; Statute; Executory Agreement.*—The statute does not apply to executed contracts, and hence, a mortgage executed pursuant to a prior parol agreement to answer for the debt of another is not void under the statute of frauds.

APPEAL from Pike Chancery Court.**Heard before Hon. L. D. GARDNER.**

Bill by Rena Minchener against Fox Henderson to annul a mortgage because given as security for the husband's debt, with cross bill by Henderson to declare the deeds conveying the land to the wife fraudulent and void as to him. From a decree for respondent complainant appeals. **Affirmed.**

J. M. CHILTON, and W. E. GRIFFIN, for appellant. Where error affirmatively appears injury is presumed unless the contrary affirmatively appears.—*Nelson v. State*, 120 Ala. 83; *Clewis v. Malone*, 131 Ala. 469.

[Minchener v. Henderson.]

Injury affirmatively appears here. Henderson was not a subsisting creditor at the time of the deed from Minchener to his wife.—*Sloan v. Wilson*, 117 Ala. 583; *Tate v. Murphy*, 80 Ala. 440; 4 Mayf. 396. There is a variance between the pleading and the proof in the cross bill.—14 Enc. of Evid. 133; 130 Pa. St. 299; 39 N. J. E. 130; *Peters v. So. Ry.*, 135 Ala. 533. The agreement, in any event, was a nudum pactum.—*Adams v. Adams*, 26 Ala. 272; *Ervin v. Ervin*, 25 Ala. 236; *Pulliam v. Schimpf*, 109 Ala. 179; *Dargan v. Hewlett*, 115 Ala. 510; *Elmore et al. v. Parrish Bros.*, 170 Ala. 499. No actual fraud is shown, and this is essential in a suit by a subsequent creditor.—*Gilleland v. Fenn*, 90 Ala. 230; 5 Heisk. 346; 20 Cyc. 427; *Allen v. Pearce*, 163 Ala. 612.

JOHN H. WILKERSON, and FOSTER, SAMFORD & CARROLL, for appellee. At the time of the execution of the conveyance from Minchener to his wife, Henderson was an existing creditor, and the conveyance was void as to him, notwithstanding the wife knew nothing of the indebtedness, and participated in none of the fraud.—*Washington v. Arnold*, 167 Ala. 448; *Dickson v. McLarney*, 97 Ala. 389; *McGhee v. Bank*, 93 Ala. 193. Even if not an existing creditor, he was a subsequent creditor, and there was actual fraud in the transaction.—*Echols v. Perung*, 107 Ala. 665; *Echols v. Orr*, 106 Ala. 237; *Gilliland v. Fenn*, 90 Ala. 230, and authorities supra. Although allegations are made in the original pleadings in chancery, it is not necessary to prove that allegation if sufficient allegations are made and proven to entitle complainant to relief, hence, there was no material variance.—*Clemmons v. Cox*, 116 Ala. 572; *Noble v. Moses*, 81 Ala. 548; *Offutt v. Scott*, 47 Ala. 102, and authorities cited.

[Minchener v. Henderson.]

MCCLELLAN, J.—Rena Minchener, the wife of J. R. Minchener, filed her bill against Fox Henderson, praying the cancellation of a mortgage, for \$2,130.62, executed, on December 4, 1907, by complainant along with her husband to secure the payment of the husband's note for that amount to Henderson. The mortgage was upon a certain lot in Troy, Ala., which had been conveyed, as a gift, by J. R. Minchener's father to him on August 16, 1906. On May 21, 1907, J. R. Minchener made a voluntary conveyance of this lot (less a part sold to Wood) to his wife. It is upon this conveyance that complainant rests her title to the lot described in her bill, and out of which she would derive her right to have the mortgage canceled as a security upon *her* property for her husband's debt. Henderson asserts, among other things, in his answer and cross-bill, that the voluntary conveyance to complainant was in fraud of his rights as a *then* (May 21, 1907) existing creditor of J. R. Minchener, and prays in his cross-bill that the voluntary conveyance be annulled in accordance with the practice in such cases prevailing. The chancellor declined to grant the foreclosure of the mortgage, as also sought by the cross-bill, upon the notion that the mortgage debt had not matured when the cross-bill was filed. Hence this matter of foreclosure is not the subject of consideration on this appeal.

Whether Henderson was, at the time stated, an existing creditor of J. R. Minchener, depends upon whether, previous to that time, viz., about January, 1907, J. R. Minchener and Henderson had made the agreement to be stated. J. R. Minchener and Fox Henderson were equal partners in a milling and building supply concern, styled, Henderson & Minchener, doing business at Troy. The business was under the management of Minchener. After J. R. Minchener became the owner

[Minchener v. Henderson.]

of the lot as stated, he decided to build a dwelling upon it. Henderson was a man of large means. Minchener appears to have then had little, if anything, besides his share in the business, which the evidence shows without dispute was heavily indebted, and the lot, the gift of his father. The cross-complainant contends that he and Minchener discussed Minchener's proposed building, and agreed, about January 1, 1907, that the firm should furnish materials, labor, and money to build the proposed house, Minchener keeping a memorandum account of the items, and when the building was completed the amount thereof should and would be charged on the firm books to Henderson, and then Minchener should and would give Henderson a mortgage on the lot to secure the payment to Henderson of the sum so charged to him. It is denied that such agreement was ever made, though it is admitted that a mortgage was executed, as stated. It is not denied that values, furnished by the firm assets, to the amount expressed in the note and mortgage to Henderson, were applied to the construction of the dwelling—to the improvement of the lot in question. No sound reason, legal or equitable, has been suggested, and none occurs to this court, why both of the partners in a firm may not, as between themselves, appropriate firm assets to the advantage of one of them, and agree that, upon the other partner's assumption to reimburse the firm the value of the assets so delivered, the partner to whose advantage such firm assets were advanced should *individually* secure the other partner's repayment by a mortgage on his individual property. Such an agreement, if executed, would satisfy the firm for its thus appropriated assets, and constitute, in consequence, an *individual* liability by the one partner to the other.

[Minchener v. Henderson.]

If it should be assumed that that character of engagement was, in legal effect, a contract to answer for the debt, default, or miscarriage of another and within the statute of frauds, and if it should be further assumed that a mortgage executed, after the sum was ascertained, in pursuance of such an engagement, did not evidence a compliance with the requisitions of the statute of frauds, the invalidating effect of a noncompliance with the statute of frauds could not be visited upon the contract if it had become executed. The statute of frauds applies to executory, not executed, contracts.—*Kling v. Tunstall*, 124 Ala. 268, 27 South. 420, among others. If the contract which the cross-complainant asserts was made, it was executed. The material, etc., was furnished and applied, and the firm was satisfied therefor by the cross-complainant, and the mortgage was given by J. R. Minchener to assure his reimbursement. Did the parties—the partners—engage as cross-complainant contends?

The evidence upon this earnestly discussed issue has been examined with the utmost care. While there is irreconcilable conflict thereupon between the evidence of the adverse parties, and while there are bases for the necessarily, naturally, partisan argument made for the appellant that all of the evidence, as to details, for cross-complainant upon this issue, does not *perfectly* harmonize, we can see no possible escape from the conclusion, prevailing, on the whole evidence, with the learned chancellor.

There is nothing in the evidence supporting cross-complainant's theory that would or does abnormally tax a rational credulity. The subject-matter and object of the agreement were of the commonplace. The lot owner, under the agreement, got his property improved as he desired, the firm was paid for what it advanced

[Minchener v. Henderson.]

of its assets, and the other partner was assured of his reimbursement by the mortgage. The admitted acts of the parties, together with the attending circumstances which the evidence discloses, confirm the correctness of the finding on this issue.

There is no sound basis in the evidence for the insistence that Minchener was overawed or overpersuaded by Henderson. He kept the mortgage a month or more before he and his wife executed it. He consulted an attorney in the premises. His conduct entirely accorded with the agreement stated. The book entries, some in his handwriting, conform to the course of dealing and conduct the agreement anticipated. If Henderson secretly desired to dissolve the partnership at the time the mortgage was given, which was after the completion of the dwelling, that fact would not affect unfavorably the performance of the agreement made by the parties before the materials, etc., were used in the building. There was shown no contractual obligation binding either of the members to continue, for any definite period, in the partnership.

There is an insistence for appellant that material variance between allegations of the cross-bill and the proof relating thereto require the reversal of the decree. While there are material differences between that pleading and evidence with respect to the theories of the cross-bill wherein actual fraud is a factor, there is no variance, but, on the other hand, substantial conformity, with respect to the complete, distinct, and separate equity upon which relief was granted below, and which must, on this record, be affirmed here, viz., that Henderson was an existing creditor of Minchener when the voluntary conveyance to the complainant (his wife) was executed—a character of conveyance subject to be avoided at the instance of such a creditor in a court of

[B'ham Ry. L. & P. Co. v. Smyer.]

equity. Under such circumstances, the failure of proof to sustain distinct equities asserted in the pleadings, on variances between distinct equities there asserted and the evidence adduced in the cause, will not hinder or prevent the granting of relief upon another or other distinct grounds therefor set forth in the pleading and sustained by the evidence. "When the bill justifies relief and the defendants have not been taken by surprise, a decree will not be reversed, or a new trial granted, because of variance."—Authorities collated in *H. B. Claflin Co. v. Muscogee Mfg. Co.*, 127 Ala. 380, 30 South. 555.

The decree is affirmed.

Affirmed.

DOWDELL, C. J., and SAYRE and SOMERVILLE, JJ.,
concur.

B'ham Ry. L. & P. Co. v. Smyer.

(Cross Appeal.)

Bill to Restrain the Laying of Car Line in Street.

(Decided February 6, 1913. Rehearing denied March 18, 1913.
61 South. 354.)

1. *Municipal Corporation; Streets; Use of.*—The right of the public to use the streets for travel is superior to that of an abutting owner, or any other person to use it for any other purpose, such as standing vehicles near the curbing in loading or unloading goods.

2. *Same.*—The rights of the public to pass over the street extends to every part of it, and applies to the use of new classes of vehicles as they come into use, as well as to those existing when the street was opened, except any new use which tends to destroy the street as a means of travel common to all.

3. *Same; Obstruction; Nuisance.*—Any unauthorized, permanent obstruction of a street preventing its use by the public is a nuisance which a court of equity will abate in a proper suit.

[B'ham Ry. L. & P. Co. v. Smyer.]

4. *Eminent Domain; Rights of Abutting Owners.*—Section 235, Constitution 1901, does not authorize an abutting owner to recover for inconveniences in loading and unloading goods at the curbing occasioned by the construction of a street railway track in the street abutting the premises.

5. *Same; Street Use; Double Track.*—The laying of a second street car track in a city street thirty-four feet wide, to afford double track facilities, is not such a use of the street as entitles the abutting owner to enjoin the laying of such track, and does not constitute such additional burden or servitude as to entitle the abutting owner to compensation, notwithstanding such laying of such track, thereby renders inconvenient such abutting owner's use of the street in loading and unloading goods at the curbing.

6. *Same.*—An injury which an abutting owner sustains on account of increased danger of collision with passing cars on account of the construction of an additional car track on the street is one suffered in common with the general public, and cannot be made the basis of a private action.

7. *Street Railways; Use of Streets; Right of Abutters.*—Where a street car company, under municipal authority constructs an additional track on a street to afford double track facilities, it is not rendered liable to an abutting owner for taxes paid by him for paving the street.

APPEAL from Jefferson Chancery Court.

Heard before Hon. A. H. BENNERS.

Bill by E. J. Smyer against the Birmingham Railway Light & Power Company to enjoin the laying of double tracks in a certain street in the city of Birmingham, and for other relief. From the decree rendered, respondent appeals, and complainant takes a cross appeal. Affirmed on cross appeal, and reversed, rendered and remanded on direct appeal.

TILLMAN, BRADLEY & MORROW, and FRANK M. DOMINICK, for appellant. The word injured as used in section 235, Constitution 1901, includes only the violation of a right, or damages for the violation of a legal right. —88 Am. St. Rep. 895; 40 Am. St. Rep. 319; 61 Am. St. Rep. 770; 51 Pac. 526; 41 N. E. 817; 132 N. C. 573; 35 Atl. L. R. A. (N. S.) 1054; Lewis on Eminent Domain 365; 15 Cyc. 656; *M. & C. R. R. v. B. S. & T. R. R. Co.*, 96 Ala. 577. A street railway track is not an

[B'ham Ry. L. & P. Co. v. Smyer.]

additional servitude on a public highway.—*Bir. T. Co. v. B. R. & E. Co.*, 119 Ala. 137; *Baker v. Selma S. & S. Ry. Co.*, 130 Ala. 471; *Morris' Case*, 143 Ala. 246; 14 L. R. A. (N. S.) 196; Elliott on Roads & Streets, sec. 495; *Hobbs v. Long Dis. T. & T. Co.*, 147 Ala. 393. While it is conceded that complainant would have a right to a reasonable use of the street in having wagons stand there while loading and unloading, yet the private interests is subject to the general interests of the community.—*Costello v. State*, 108 Ala. 45; 1 Am. St. Rep. 840; 43 Am. Dec. 709. Complainant would have no right to have wagons and vehicles stand at right angles to the curb in loading and unloading.—9 Am. Rep. 646; 33 S. W. 592; 25 L. R. A. (N. S.) 1278; 20 S. W. 658; 30 S. W. 535; 23 Atl. 884; *Morris' Case*, *supra*. The injury alleged to be suffered is one common to the general public, and cannot therefore be made the basis of an action for a private wrong. Complainant was not entitled to compensation under section 227, Constitution 1901.—*Town of Eutaw v. Botnick*, 150 Ala. 429; *Enterprise L. Co. v. Porter*, 155 Ala. 426; Lewis Eminent Domain 365, and authorities *supra*.

E. H. DRYER, and E. J. SMYER, for appellee. The appellee is the owner to the center of the street, and the public has only an easement on it.—*Wes. Ry. v. Ala. G. T. Ry.*, 96 Ala. 280; *M. & M. Ry. Co. v. Ala. Mid.*, 116 Ala. 66. The state is not the owner, but simply a trustee charged with the administration of a trust for the general public, and the same is true of a municipality.—*State ex rel. Atty. Gen. v. L. & N.*, 158 Ala. 211; *B. & P. M. Ry. Co. v. Bir. St. Ry.*, 79 Ala. 473. The ultimate fee remaining in the abutting owner, he may redress the wrong.—*M. & M. v. Ala. Mid.*, *supra*; *Perry v. N. O. M. & C.*, 55 Ala. 424; *Douglass v. City*

[B'ham Ry. L. & P. Co. v. Smyer.]

of *Montgomery*, 118 Ala. 599. The grant of the right by the city for the use of the streets for railway purposes did not authorize a destruction of the use of the street, and the grant if it went beyond the powers of the city was unauthorized and void.—*Duy v. Ala. Wes.*, 57 South. 724; *Albes v. So. Ry.*, 164 Ala. 356; *Port of Mobile v. L. & N.*, 84 Ala. 115; *City of Mobile v. L. & N.*, 124 Ala. 138. Counsel then set out the powers of the city of Birmingham as granted by the state, and insist that the powers granted did not authorize the city to make the grant here complained of.—Authorities supra, and *Costello v. State*, 108 Ala. 45; *First Nat. Bank v. Tyson*, 138 Ala. 459; 27 A. & E. Enc. of Law, 174. A street railway has not the right to occupy or use the whole width of the street to the exclusion of the public or of other vehicles, and the city has not the right to grant it.—*H. A. & B. R. R. Co. v. B. R. & E. Co.*, 113 Ala. 239; *Bir. T. Co. v. B. R. & E. Co.*, 119 Ala. 143; *M. J. & K. C. R. R. Co. v. Middleton*, 139 Ala. 610; *Morris v. Montgomery T. Co.*, 143 Ala. 246. The court, therefore, properly granted damages although its rulings as to the right to lay the track was erroneous.—*McEachin v. City of Tuscaloosa*, 164 Ala. 263; *Bir. T. Co. v. B. R. & E. Co.*, supra; *Morris v. Mont. T. Co.*, supra; sec. 227, Constitution 1901. If the street car company had a right to lay their tracks, it ought, in equity, to be required to refund to appellee the amount paid by him for paving the street.

MAYFIELD, J.—The following statement of the record, which is practically appellee's statement of the case made by his bill, presents the following questions for decision on this appeal: (1) Can a person whose property abuts on a public street in a city, which street is 34 feet wide, is much used for general travel, has

[B'ham Ry. L. & P. Co. v. Smyer.]

been paved at the expense of abutting owners, and accommodates an electric street car line which is operated at grade, have injunctive relief against the street car company to prevent the construction by it of a double track on that street, notwithstanding the construction of such line is authorized by the city authorities? If not entitled to an absolute and permanent injunction, is he entitled to have the construction restrained until compensation is paid him for the injury of his property and for his aliquot part of the cost of paving the street in front of his property? These questions depend upon the answers to the following inquiries: First. Will the construction of the second car line or double track amount to a nuisance? Second. If it will not constitute a nuisance, will it be an additional servitude imposed upon the street, in excess of the use intended or designated in the act of dedication? Third. Are the plaintiff's damages, such as are shown in his bill, within the protection of section 235 of the state Constitution, which reads as follows: "Municipal and other corporations and individuals invested with the privilege of taking property for public use, shall make just compensation, to be ascertained as may be provided by law, for the property taken, injured or destroyed by the construction or enlargement of its works, highways or improvements, which compensation shall be paid before such taking, injury or destruction. The Legislature is hereby prohibited from denying the right of appeal from any preliminary assessment of damages against any such corporation or individuals made by viewers or otherwise, but such appeal shall not deprive those who have obtained the judgment of condemnation from a right of entry, provided the amount of damages assessed shall have been paid into court in money, and a bond shall have been given in not less than double the amount

[B'ham Ry. L. & P. Co. v. Smyer.]

of damages assessed, with good and sufficient sureties, to pay such damages as the property owner may sustain; and the amount of damages in all cases of appeals shall on demand of either party, be determined by a jury according to law?" Fourth. If his damages are not within the protection of section 235 of the Constitution, are they within the protection of section 227 of the Constitution, which reads as follows: "Any person, firm, association or corporation, who may construct or operate any public utility along or across the public streets of any city, town or village, under any privilege or franchise permitting such construction or operation, shall be liable to abutting proprietors for the actual damages done to the abutting property on account of such construction or operation?"

The prime purpose of streets is use for travel by the public. The right of the public to the use of the street is paramount to that of an abutting owner, or to that of any individual or corporation, no matter what may be the use to which he desires to devote a part of the street. Any unauthorized permanent obstruction of the streets, which prevents the exercise of this use by the public, is a nuisance, which a court of equity, in a proper suit, will abate. There are, however, some temporary obstructions and partial occupations of the streets, by individuals or corporations, which are allowed on the ground of necessity, such as materials for building or for repairing placed thereon by abutters in such manner as to cause the least inconvenience to the public. Moreover, individuals are permitted to use a part of the street, a reasonable length of time, for the receiving and delivering of goods at their residences or business houses abutting on the streets. These private uses, however, must not be inconsistent with the reasonably free passage of travel; but necessity justifies slight

[B'ham Ry. L. & P. Co. v. Smyer.]

inconveniences and occasional interruptions in the free use of the whole of a street by the public.

The rule is well stated by Earl, J., in the case of *Callanan v. Gilman*, 107 N. Y. 360, 14 N. E. 264, and approved by Mr. Freeman in a note to that case as reported in 1 Am. St. Rep. 831. It is there said: "An abutting owner, engaged in building, may temporarily encroach upon the street by the deposit of building materials. A tradesman may convey goods in the street to or from his adjoining store. A coach or omnibus may stop in the street to take up or set down passengers; and the use of a street for public travel may be temporarily interfered with in a variety of other ways, without the creation of what in the law is deemed to be a nuisance. But all such interruptions and obstructions of streets must be justified by necessity. It is not sufficient, however, that the obstructions are necessary with reference to the business of him who erects and maintains them. They must also be reasonable with reference to the rights of the public who have interests in the streets which may not be sacrificed or disregarded. Whether an obstruction in the street is necessary and reasonable must generally be a question of fact to be determined upon the evidence relating thereto." Under this doctrine it was at first thought that the placing of a fixed track of rails in a street, on which street cars were to be operated, was an unwarranted obstruction of the street, though the cars were drawn by horses or mules; but all the courts held that it was not an unwarranted obstruction, but was a means of facilitating public travel along the street, and was therefore not a nuisance but an improved mode of use of the street for the purpose intended. The New York court, however, held that, while it was not a permanent obstruction, yet it was an additional servitude imposed upon the high-

[B'ham Ry. L. & P. Co. v. Smyer.]

way, as to which the abutting owner was entitled to compensation; but all the other courts, save that of Nebraska, held that it was not even an additional servitude, and that the abutting owner was not entitled to compensation by reason of the construction of a street car track at grade in the street.

In the course of progress and the development of street transportation, the horse car was superseded by the dummy or steam line, and this by the electric car system; and it was in turn contended that each of these agencies of travel involved an unauthorized, unwarranted use of the streets, and therefore constituted an obstruction and a nuisance, or, if not a nuisance, an additional servitude imposed upon the highway, not included in or authorized by the original dedication or condemnation. This question was first considered by this court in the case of *Perry v. N. O., M. & C. R. R. Co.*, 55 Ala. 413, 28 Am. Rep. 740, wherein the court, through Stone, J., spoke as follows: "The introduction of railroads as highways of travel and transportation has seemingly disturbed some of the old landmarks, and requires of the courts, in accommodation to the spirit of progress, that we apply principles, long well understood, to new conditions and exigencies. 'All property,' says an eminent authority, 'is held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations, established by law, as the Legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient.'—*Commonwealth v. Alger*, 7 Cush. [Mass.] 84, 85, per Shaw, C. J. 'By this general police

[B'ham Ry. L. & P. Co. v. Smyer.]

power of the state, persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state, of the perfect right in the Legislature to do which no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned.'—*Thorpe v. Rutland & Burlington R. R.*, 27 Vt. 140, 149 [62 Am. Dec. 625]."

In *Perry's Case* it was held that an ordinary commercial railroad laid in a street was an additional servitude, and that a municipal corporation, without express authority from the Legislature, could not authorize it.

The question was again before this court in the case of *Western Railway of Alabama v. Alabama Grand Trunk Railroad Co.*, 96 Ala. 272, 11 South. 483, 17 L. R. A. 474, in which case the authorities were reviewed; and it was held that: "Where a railroad company, under express legislative and municipal authority, constructs its road on a street in a city, the fee to which street is in the proprietors of the property abutting thereon, such railway company is not a trespasser nor its railway an unlawful obstruction or nuisance upon such street, and that an injunction will not lie in favor of such proprietor to restrain the construction of the road.—*Perry v. N. O., etc., Railroad Co.*, 55 Ala. 413, 28 Am. Rep. 740. But even in such cases, if the road is so constructed as to interfere with the easement of access residing in the proprietor of the property abutting on the street, or as to cause other special damage to his property, such proprietor is clothed with the right to prevent such injury by resort to a court of equity, or to redress the same in a court of law as he may elect.—*Highland Ave. & B. Ry. Co. v. Matthews* [99 Ala. 24] 10 South. 267 [14 L. R. A. 462]; *Evans v. Sav. & West. Ry. Co.*, 90 Ala. 54 [7 South. 758]."

[B'ham Ry. L. & P. Co. v. Smyer.]

In many respects a broad distinction is recognized in the authorities between urban and suburban and rural servitudes. A variety of uses to which the first may be applied without compensation to the owner of the ultimate fee, as having been within contemplation when the street was dedicated or condemned, would be an additional burden for which compensation must be made to owners of abutting property when the highway is a suburban or country road. The limited or restricted nature of the servitude of a suburban road undoubtedly leaves a very much greater right and interest in the owner of the servient estate than that which remains in the owner of a like estate in a city street; but it is not possible, under the authorities as they now stand, to mark with exactness and precise accuracy the extent of the interests and rights which remain in the owner of the servient estate in a country road.—Elliott on Roads, etc., p. 303.

The question was again considered in the case of *Birmingham Traction Co. v. Birmingham Railway & Electric Co.*, 119 Ala. 137, 24 South. 502, 43 L. R. A. 233. It was there said, as to the three modes of transportation of passengers: "The electric railways, such as we are now considering, are of comparatively recent development, yet, as is of common knowledge, they have practically superseded all systems of street railway enterprise (saving the cable systems in the larger cities), and their nature and modes of construction and operation, as affecting or not the legitimate use of streets within the implied contemplation of the dedication, have been subjects of frequent consideration and adjudication by courts of last resort in this country; and it may be said that there is almost unanimity in the adjudications that such uses are legitimate uses of streets, by the permission of municipalities, without any

[B'ham Ry. L. & P. Co. v. Smyer.]

right of the owner of the fee to compensation therefor."

In *Baker v. Selma Street & Suburban Railway Co.*, 130 Ala. 474, 30 South. 464, after quoting the above, it was said that: "The construction and operation of an electric street railway with municipal consent, along a public street, and conforming to its grade, with no special injury to the fee, is not the imposition of an additional servitude for which the owner of the fee can demand compensation."

The case of *Morris v. Montgomery Traction Co.*, 143 Ala. 246, 38 South. 834, was a case very much like this at bar. There the street car company proposed to lay one track only in a very narrow street. The bill alleged: "That said street was very narrow, being only 24 feet in width, and was one of the principal thoroughfares in the city of Montgomery, and was passed by a great number of people daily, in wagons, buggies, and other vehicles. That the street railway proposed to occupy 10 feet of such street, and would thus prevent the passage of vehicles thereon, which would result in the necessary abandonment of such street, to the great inconvenience and injury of complainants. That property on said street would be exposed to greater dangers from fire, for the reason that fire engines and apparatus could not pass a car thereon." The court in that case held that complainants were not entitled to injunctive relief, citing the decision of 119 Ala. 144, 24 South. 502, and 130 Ala. 474, 30 South. 464 (above quoted from), and also *Joyce on Electric Law*, and *Booth and Nellis on Street Railroads*; the court quoting and saying: "Streets and highways are dedicated to the new use of the traveling public, and street railways, which are for the purpose of facilitating travel, impose no additional burden upon the abutting owner, and are a public use.' If they create noise, dust, and vibrations, and are

[B'ham Ry. L. & P. Co. v. Smyer.]

attended with some inconvenience and even danger to life and property, so do other vehicles of travel and trade. They are legitimate uses within the original dedication of streets for the benefit of the public.—Joyce on Electric Law, § 278, 341. 'A street surface passenger railway, constructed at street grade in the usual manner and operated by animal power (or by electricity), is not per se a public or private nuisance; nor is it a new servitude imposed upon the land for which the owners of the fee are entitled to compensation.'—Booth on Street Railways, § 82. Such a use by the ordinary electric railway, with the usual means by which it is operated, is but an improved method of using the street for public travel; and there is no limit to the use of a public street for the purposes of travel thereon so long as such use does not interfere unnecessarily with the ordinary modes of travel, and is no substantial impairment of private rights of property.—Nelson on Street Surface Railroads, p. 135."

The ownership of lands which have been taken for, or dedicated as, public streets of cities, for most all practical purposes, is in the public. It is true that the naked fee often (as in this case) remains in the abutting proprietor; but this is not allowed to interfere with the use of the street as a highway by the public.

Lands once taken for, or dedicated as, public streets are taken for all time for the purpose of providing a means of passage common to all the people, and may be rightfully used in any way that will best serve this purpose. The public thus acquire the right of passage over every part of it, from side to side, and from end to end. They acquire the right to so use it, not only by the means of vehicles then in use, but also by other means and vehicles which science and the improvement of the age may invent or discover, to meet the needs of

[B'ham Ry. L. & P. Co. v. Smyer.]

the ever-increasing population, or which may become necessary or expedient, provided such vehicles or modes do not exclude the proper use by other modes or kinds of vehicles. Any use of the street for public travel, which is within the limits of the public easement, whether it be by old or new methods, provided it does not tend to destroy the street as a means of passage and travel common to all, is lawful and permissible. These cases seem to settle the question raised on this appeal against the contention of the complainant, appellee here, except as to the cost of paving, unless the laying of a double track in a street, instead of a single track, differentiates this case in principle, or unless section 227 of the Constitution of 1901 has charged the rules of law upon this subject.

We do not think that the laying of a double track in the street, which is 34 feet in width, and in the manner alleged in this bill, is an unwarranted use of the highway, and one not included in, nor contemplated by, the original dedication of the street in question. If one line of the kind in question is for the purpose of "facilitating travel," and "imposes no additional burden upon the abutting owner," nor a "new servitude" upon the land, for which the owner is entitled to compensation, but is "only an improved method of using the street for public travel," then two lines or a double tracking of the same line, provided the public travel justifies and demands the same, must fall within the same category.

It may be that one line or a single track will not afford proper or adequate means of transportation for the requirements and demands of a growing city; and, if not, then we can see no actionable wrong in the city's allowing or providing for two or more lines upon one street. We do not mean to say that a city cannot exceed its authority in placing so many car lines and cars

[B'ham Ry. L. & P. Co. v. Smyer.]

on a given street as to constitute an additional burden, or a new servitude, not contemplated or intended in the dedication of the highway; but what we mean to decide is that a double track on the street in question, under the conditions shown in the bill, is not such an additional burden or servitude as would entitle the owner of an abutting fee to compensation. It is, we think, practically certain that the street in question will be as safe and as convenient for public travel in other vehicles, after the two tracks are laid, as now.

It is very true that complainant and others who desire to have wagons and other vehicles stand at or near the curbing for the purpose of loading and unloading goods and freight may suffer some inconvenience; but, as we showed at the outset of the opinion, this is a convenience allowed them by the law, which must yield to that of public travel along the street, whether it be in cars, in wagons, on horseback, or in automobiles or in omnibuses. The old adage that "the street car is the poor man's carriage" is modernized so that the saying now is, "The street car is the poor man's automobile." The streets are primarily for public travel, for pedestrians and vehicles and conveyances in motion, and not for the purpose of their standing thereon. One of the laws of the road is, "Move on, don't stop." The policeman on duty in a crowded street proclaims it when he continually shouts, "Move on, don't block the street or sidewalk."

If the street in question is much used by many people in vehicles, as is alleged, then the complainant's right to stand his wagon in the street, at his curb, must yield to the right of the many people to pass along the street if both cannot be done at the same time. His rights and those of the public, the many travelers of the highway, are the same, whether they all be in wagons, car-

[B'ham Ry. L. & P. Co. v. Smyer.]

riages, omnibuses, automobiles, or in the street cars, except that the street cars must move on a fixed track, and cannot turn to the right or the left, as can other vehicles. The right of the public to pass is paramount to the right of the individual to stand.

There is shown no good reason why the complainant cannot use his premises in the same manner, after the two tracks are laid, that he did before. It might be more inconvenient and more dangerous to load and unload wagons at the curb after than before; but this is true as to all increased travel on a given street, whether it be in cars or in other vehicles. An additional line of public carriages, omnibuses, taxicabs, or stage-coaches makes travel along the highway in other conveyances more inconvenient and more dangerous, to say nothing of increasing the congestion by standing on the streets. The only difference as to another line of street cars is in degree and not in kind, except that the cars must move on a fixed track.

The bill in question claims two kinds of damages to the property of complainant, viz., damages resulting from destruction or impairment of his right of access to his property, and those resulting from increased danger to travel from collisions with passing cars. The latter is an injury or a damage which complainant would suffer in common with the general public, and one which would not authorize a private action.

The real and only serious question in the case is the alleged impairment of complainant's right of access to his residence and property which abuts on Twentieth street. The main fact alleged to show such impairment is that the car track will be laid so close to the curb as to make it impracticable and dangerous for wagons or other vehicles to stand in the street near the curb for the purpose of loading and unloading goods at his resi-

[B'ham Ry. L. & P. Co. v. Smyer.]

dence. There are many affidavits to support this averment of the bill which go into details more or less.

We are constrained to hold, however, on the undisputed facts, that there will be no substantial impairment of the easement of access to complainant's residence. The most that can be said is that the access may be made more inconvenient by reason of the fact that wagons or other vehicles cannot, with safety, stand at the curbing while a car is passing; but, as we have before said, this is one of the natural and "to be expected inconveniences" from traffic on a street of this kind, and one that must be held to have been contemplated or included in the original act of dedication or condemnation of the land to the use of a public street in a great city.

The case of *Wagner v. Bristol R. L. Ry. Co.*, 108 Va. 594, 62 S. E. 391, 25 L. R. A. (N. S.) 1278, is the authority nearest in point that we have been able to find. The bill in that case sought to enjoin the construction of a surface street car track at the side or edge of the street. The allegations were: (1) That an additional servitude was imposed upon the land occupied by the streets; (2) that ingress and egress were unreasonably interfered with; (3) that complainant's property would be thereby made less valuable, desirable, and comfortable as a residence. That state has a constitutional provision like section 235 of ours, to the extent that it provided compensation for "injury" to property as well as for the "taking" thereof. The court in that case held: "Charter authority of a municipal corporation to permit car lines to be built in its streets, and to determine and designate the route therefor, is not modified by a statute under which the street car company is acting, which provides that such tracks shall not in any wise obstruct or interfere with the use of the street, or

[B'ham Ry. L. & P. Co. v. Smyer.]

damage property without compensation. The mere fact that a street railway is located on the side, rather than in the center, of the street is not sufficient to show that the abutting owner is entitled to compensation under a constitutional provision that private property shall not be damaged for public use without compensation. That a vehicle cannot stand between a street car track located on the side of the street and the curb while a car is passing does not show a violation of the rights of the abutting owner under a constitutional provision that private property shall not be damaged for public use without compensation. That the location of a street railway in a street will render abutting property less desirable and less comfortable as a residence does not entitle its owner to compensation under a constitutional provision that compensation must be made in case private property is damaged for public use."

It is further said in the opinion in that case, quoting in part from others: "In *Henry Gaus & Sons Mfg. Co. v. St. Louis, K. & L. R. A. Co.* 339 [113 Mo. 308, 20 S. W. 658] 18 L. R. A. 339 [35 Am. St. Rep. 706], the tracks were laid so close to an abutting owner's property as not to permit wagons to stand between the tracks and the property; yet it was expressly held not to come under the damage clause of the Constitution. The convenience and advantage of all the inhabitants of the city, and of the public at large, must be regarded as the objects contemplated when the street was laid out or opened. A narrower construction would require a sacrifice of the greater interests of the community and the public to the inferior and subordinate claims of the local lot owner. Such a construction of the law governing the dedication of public streets and the reserved rights of the original landowner and his assigns in the street, by unreasonably increasing the cost of rights of way or

[B'ham Ry. L. & P. Co. v. Smyer.]

use, would obstruct all progress and deprive the local community of the benefit to be derived from the advancements of science, invention, and discovery. The suggestion that, because a vehicle could not stand between the track and the curb while a car is passing, the appellant's rights would be violated is without merit. While appellant has unquestionably the right to occupy the street in front of his property to take away or deliver persons or goods, he may occupy the street for such purposes a reasonable length of time, and that right the street railway company must accord to him; and both must recognize that streets are established for the purpose of facilitating the passage of persons from one part of the city to another, and not for the standing of vehicles or storage of goods thereon.—See authorities above cited and Elliott on Roads and Streets, ** 716, 717, 878. In a note to *Ashland & C. Street R. Co. v. Faulkner*, 43 L. R. A. 557, it is said: 'So, while the abutting owners have an easement in a street, in common with the whole people, to pass and repass, and also to have free access to their premises, the mere inconvenience of such access, occasioned by placing a street car track so near the sidewalk as not to leave sufficient space for a vehicle to stand, is not the subject of an action. * * * So a street railway, one of the tracks of which was in such close proximity to the sidewalk in front of the premises of an abutting owner as to interfere with, impede, and prevent his complete enjoyment of the use and occupation thereof, leaving insufficient space between the sidewalk and the track to admit of any kind of vehicle to be driven or to remain in front of his premises, is not, for that reason, a public nuisance, where the title to the street vested in the city; but the injuries * * * are referable to that class of disadvantages to which one is subjected, resulting

[B'ham Ry. L. & P. Co. v. Smyer.]

from the lawful exercise of the absolute power of control vested in the state in connection with the title to the fee of the land.' In *Rafferty v. Central Traction Co.* [147 Pa. 579, 23 Atl. 884, 30 Am. St. Rep. 763], it was held that the right of an abutting owner to the use of the street is the same after the tracks are laid thereon and the cars running as it was before. If, at any time, he has occasion, for the presence of vehicles on the street in front of his property, to take away or deliver persons or goods, he may exercise that right for such reasonable time as is necessary for his purpose; and if, in such exercise of the right, the passage of street cars is impeded, they must wait. See, also, *Kellinger v. Forty-Second Street & G. Street Ferry R. Co.*, 50 N. Y. 206."

It follows, from what we have said, that complainant is entitled to no relief in equity under common-law principles, nor by virtue of section 235 of the Constitution of this state.

It is unnecessary for us to now construe section 227 of the Constitution for two reasons: First, the only damages sought in this bill are those as for injury to or impairment of the easement of access; and we are certain that no such damages are shown as are recoverable under section 235 of the Constitution; second, whatever may be the purpose, object, or effect of section 227 of the Constitution, it is unlike section 235 of that instrument in that it does not contemplate or require the payment of damages before the injury, and would therefore not support an action until the injury was suffered.

We are unable to see how or why the street car company, in a suit like this, should be required to refund to the complainant taxes which he has paid for paving the street in question. It is a mere incident that, if

[B'ham Ry. L. & P. Co. v. Smyer.]

double tracks had been laid when the streets were paved, the street car company would have been required to pay a part of the tax which complainant paid. The city might have required the payment of this amount as a condition precedent to the right to construct the double track; but, not having done so, it is not within the power of the chancery court, nor of this court on appeal, to require the street car company to refund to complainant any part of the tax paid by him for this paving. This is a matter that rests primarily with the city; and its action in the premises cannot be controlled or changed in a collateral proceeding like this.

We have examined many reported cases like the one in question, and we feel sure that all the cases in which injunctive relief, such as is prayed in this case, was granted are readily distinguishable from this case on one or more of the following grounds: They were decisions from courts of states such as New York, in which an ordinary surface street car track, laid at grade, was held to be an additional or a new burden or servitude, and not to have been included or contemplated in the original dedication of the highway; or the construction of the track, poles, or line was held to have practically destroyed the highway or street for travel in vehicles of other kinds; or the complainant's easement of access was held to have been materially and permanently impaired, as by the changing of the grade of the street; or the construction was held not to have been authorized by the state or the municipality which was charged with the duty of controlling or regulating such affairs; or the construction was held to have been done or attempted contrary to or in violation of the rights conferred by the state or other municipal authority. Cases of this kind are *Slaughter v. Meridian L. & Ry. Co.*, 95 Miss. 251, 48 South. 1040, 25 L. R. A. (N. S.) 1265;

[B'ham Ry. L. & P. Co. v. Smyer.]

Dooly Block v. Salt Lake R. P. Co., 9 Utah 31, 33 Pac. 229, 24 L. R. A. 610; *Nichols v. Ann Arbor R. R. Co.*, 87 Mich. 361, 49 N. W. 538, 16 L. R. A. 371, and others shown by note to section 636 of Lewis on Eminent Domain, vol. 2, pp. 1366, 1367. The distinctions are well pointed out by the author in the text and by the many decisions cited in the notes. For example, in the *Mississippi case*, (95 Miss. 251, 48 South. 1040, 25 L. R. A. [N. S.] 1265) the street was practically monopolized by the street car line, and travel in other vehicles almost prohibited. In the *Utah case* (9 Utah 31, 33 Pac. 229, 24 L. R. A. 610) the tracks were not at grade, and there were already two other tracks in the street. In the *Michigan case* (87 Mich 361, 49 N. W. 538, 16 L. R. A. 371) the grade was changed, and access materially impaired. In many other cases the construction was not authorized by the state or the municipality. The New York and Nebraska cases are put upon the ground that an electric car line is an additional servitude, not embraced within the act of dedication.

It should be noted that the New York court has admitted that the weight and number of authorities are against their holding; but the court adheres to its former decisions for the reason that the doctrine has now become a rule of property, and for the sake of stare decisis. The Nebraska decisions have been rather severely criticised, and, without approving or disapproving, we merely quote from the Supreme Court of Wisconsin, where it is said: "We are aware that there is at least one case decided in a court of last resort where a different conclusion was reached. We refer to *Jaynes v. Omaha St. R. Co.*, 53 Neb. 631, 74 N. W. 67, 39 L. R. A. 751. The opinion there shows that the subject treated did not receive careful study. The conclusion reached is contrary to all the authorities cited by the court. A

[B'ham Ry. L. & P. Co. v. Smyer.]

very few cases were cited—but a small fraction of those where courts have considered the subject under discussion—yet those referred to were all the Nebraska court could find, so said in the opinion. The decision was based on the theory that any exclusive occupancy of any part of a street by a street railway is a new burden on the fee title thereof. An effort was made to harmonize the contrary holdings in the few cases cited with the opinion, which seems to have been successful in the judgment of the writer of the opinion, yet success was reached by the exercise of judicial ingenuity that has few parallels.”—*La Crosse C. R. Co. v. Higbee*, 107 Wis. 399, 400, 83 N. W. 704, 51 L. R. A. 923.

Complainant relies in part for his contention upon the doctrine announced by Mr. Lewis in his valuable work on Eminent Domain, and he quotes a text therefrom. We, like complainant, believe that Mr. Lewis has stated the true doctrine as to the right to relief of abutting owners in cases like this; and we not only quote the text relied upon by complainant, but we also quote the context as stating the true rule as to the right of the abutter to injunctive relief. In section 636 (pages 1368, 1369, 1370, vol. 2) he says: “A distinction is made in some of the states between street railroads and commercial roads; the former being held to be a legitimate use of a street as a public highway. According to this view, the abutting owner has no more ground of complaint in case a street railroad is laid down and operated in front of his property than he would have if a line of omnibuses was operated on a street. But, where street railroads are put in the same category with commercial roads, the same rules and principles will apply in respect to the rights of abutting owners. They may enjoin the use of the street for such purposes in front of their property until the right has been obtained in

[B'ham Ry. L. & P. Co. v. Smyer.]

the usual way. Where a statute gave compensation, it was held the abutter could enjoin until compensation was made. The construction of a railroad without lawful authority or after the authority has expired may be enjoined by the abutting owner. Courts which hold as a general rule that street railroads are a legitimate street use have nevertheless enjoined the construction of such a road where it would be especially injurious to the abutter, as where it was constructed with cuts and fills, or where there were already two tracks in the street. In one case a mandatory injunction was granted to compel the removal of a trolley pole so placed as to unnecessarily injure plaintiff. Where the company is required by ordinance to place its tracks in the center of the street, a different location may be enjoined by abutters." Our state, as we have shown, is one of those in which electric street cars are classed with omnibuses.

It follows from what we have said above that complainant can take nothing by his cross-assignment of errors; that the appeal of respondent (appellant here) is well taken; and that its demurrers to the bill should have been sustained and the temporary injunction dissolved. A decree to this effect will be here entered.

Affirmed on the cross-appeal, and reversed, rendered, and remanded on the main appeal. All the Justices concur.

[Kidd, et al. v. Borum.]

Kidd, et al. v. Borum.

Bill to Quiet Title.

(Decided January 16, 1913. 61 South. 100.)

1. *Wills; Construction; Intention of Testator.*—A will must be considered as a whole for the purpose of ascertaining the intention of the testator.

2. *Same; Estate Devised.*—Where a testator, who had been twice married, declared in his will that the children of his first marriage had by way of advancement, received a part of his estate, and that he had by a deed conveyed to the second wife and her children, by means of trustees with power to demand of his executors the bequest therein, and gave to his second wife and her children all his real estate in a certain county, and personal property for the use of his wife and her children, for the life of the wife with remainder to the children, and the deed mentioned conveyed to trustees other land in trust for the support of the wife and her children during her life, with remainder to her children, and directed the trustees to demand and recover of his executors any gift to the wife and the children made by the will, the real estate devised not having been conveyed to the trustees, the will when considered in connection with the deed, made the wife and her children at the time of testator's death tenants in common of an estate for life, with a remainder in fee of the whole estate to all of her children.

3. *Same; Instruments Referred to; Effect.*—Where a will, executed immediately after the execution by testator of a deed of trust which was duly acknowledged and recorded, referred to the deed, the deed, though not probated as a part of the will, could be considered to aid in the construction of doubtful provisions of the will as a part of the attendant circumstances to which the court could look in arriving at the intent of the testator.

4. *Trusts; Failure; Lack of Trustee.*—A trust properly created will not be permitted to fail for the lack of a trustee.

5. *Life Estate; Conveyance by Life Tenant.*—A deed by a tenant in common for life purporting to convey an estate in fee will be given effect as a conveyance of the grantor's interest in the estate.

6. *Same; Right of Remaindermen.*—Where a tenant in common for life conveyed the premises by deed purporting to convey a fee, and the grantee entered into possession claiming exclusive title, and he and those claiming under him continued in the actual and exclusive possession for thirty years, the tenants in common in remainder were not barred by limitations during the lifetime of the tenant in common for life.

7. *Adverse Possession; Conveyance by Life Tenant; Effect.*—Where a grantee in a deed purporting to convey the fee, but executed by a tenant in common for life, went into the possession, and held the

[Kidd, et al. v. Borum.]

same for ten years, notoriously and exclusively without recognition of the title of any other person, and those claiming under him continued such possession for more than twenty years, the grantee and those claiming under him held such possession as ripened into a title after ten years, as against strangers.

8. *Same; Acts of Ownership; Notice.*—Customary acts of ownership by one in possession under a deed purporting to convey the fee was sufficient to impute notice to all not claiming in privity with the possessor.

9. *Tenancy in Common; Conveyance by; Possession of Grantee; Effect on Co-Tenant.*—The possession of a tenant in common, without more, does not operate as a dis-seisin of the other co-tenants; to operate as a dis-seisin there must be a repudiation of the rights of the co-tenants, and a claim to exclusive ownership, brought home to their knowledge.

10. *Same.*—The knowledge or actual notice of a conveyance by a tenant in common to a stranger purporting to convey the entire estate, and possession taken under such conveyance, starts the running of the statute against the co-tenant, and actual, notorious and exclusive possession by the grantee establishes title as against them.

11. *Same.*—The burden of proving actual knowledge or notice to tenants in common of the execution of a conveyance by one co-tenant purporting to convey the whole estate, and possession and claim of ownership by the grantee under such conveyance, rests on such grantee, and those claiming under him.

12. *Same; Laches.*—Where a tenant in common for life conveys the fee and the grantee entered into possession claiming the fee, and he and those claiming under him hold the actual, notorious, continuous, and exclusive possession for more than thirty years, the co-tenants for life were deprived of their interests.

APPEAL from Shelby County Court.

Heard before Hon. E. S. LYMAN.

Bill by Lula C. Borum against Douglas W. Kidd and others to quiet title. From a decree for complainant, defendants appeal. Reversed and rendered.

The agreed statement of facts is as follows: "That John W. Kidd died in Shelby county, Ala., in 1865 Anno Domino, being at the time of his death a resident thereof. That he was at the time of his death the owner in fee of the lands described in the second paragraph of the amendment to the bill. That the said John W. Kidd left a last will and testament, in which he disposed of said lands. That said last will and testament was fully probated before the judge of the probate court of Shelby

[Kidd, et al. v. Borum.]

county, Ala., on, to wit, the 17th day of August, 1866, and recorded in the office of said judge of probate in the manner prescribed by law. Record 'H' at page 685. A true and correct copy of said will, except punctuation marks, is attached to the answer of the respondents as an exhibit thereto, and marked 'A.' That the executors of the said will named therein failed to qualify or to perform any of the duties or exercise any of the privileges imposed upon or granted to them under said will. That letters of administration cum testamento annexo were issued upon said estate of John W. Kidd, but that said lands were not subjected to the payment of decedent's debts if there existed such. That Mary Georgiana Kidd, the wife of John W. Kidd, mentioned and provided for in said will is still living. That Douglas W. Kidd, John M. Kidd, James W. Kidd, and Anna Philida Kidd were the children of John W. Kidd and his said wife, Mary Georgiana Kidd, mentioned and provided for in the third item of said will, and were all in existence at the time of the testator's death. That one of said children, John M. Kidd, was born after the making of the will, but before the death of the testator. That said children were infants of tender years at the death of the said John W. Kidd. That two of said children named in said will, James W. Kidd and Anna Philida Kidd, are dead. That Douglas W. Kidd and John M. Kidd are still living, also the wife, Mary Georgiana Kidd, has married again. That Anna Philida Kidd, one of the deceased devisees under said will and aforementioned, died unmarried and without issue leaving surviving her three brothers aforesaid and her mother, Mary Georgiana Kidd. That she died on, to wit, the year 1887. That James W. Kidd died on the 11th of April, 1909, leaving three children, Thomas J. Kidd, Meeda T. Kidd, and James M. Kidd. That he was

[Kidd, et al. v. Borum.]

also survived by his brothers aforementioned, Douglas W. Kidd and John M. Kidd, and his mother, Mary Georgiana Kidd. That at the time of the making and execution of the said last will and testament the 8th day of November, 1858, and on the same day, the said testator John W. Kidd made and executed a trust deed, which said trust deed is referred to and mentioned in the said will, and said will is mentioned and referred to in said trust deed. That said trust deed purports to grant certain property therein mentioned. That said trust deed is made an exhibit to this statement of facts and a part of this statement of facts as fully as if incorporated therein, and as evidence in said cause. Said trust deed is marked 'Exhibit I,' and hereto attached. That the executors mentioned and named in the last will and testament of the said John W. Kidd heretofore referred to did not make any conveyance to the trustees mentioned therein as they were directed to do by said will. That said executors failed to qualify or do any act relative to the estate of the testator, John W. Kidd. That the administrators cum testamento annexo did not make any attempt to convey said land to the trustees, nor was there any conveyance of any land owned by the testator to the trustees mentioned in said will, and the trustees never took possession of or exercised any control over the land in controversy or any other land of the testator. That Mary Georgiana Kidd went into possession of said land, and held same for and up to the time that she conveyed same to one Robert L. Flippin. That she held said land for about 15 years after the death of the testator, John W. Kidd, and under said will. That about the year 1880 Mary Georgiana Kidd made and executed a warranty deed to Robt. L. Flippin of the lands here in controversy. That said deed was valid in so far as it conveyed any right, title, or interest

[Kidd, et al. v. Borum.]

that Mary Georgiana Kidd had in and to said land. That Robert L. Flippin under said deed held said land for about 10 years, when he conveyed same to his daughter, Lula C. Borum, the complainant herein. That Lula C. Borum, together with her husband, has held said land under deed since its execution for a period of more than 20 years. That the deed given by Mary Georgiana Kidd to Robert L. Flippin purports to convey a fee, and that said deed was valid upon its face. That the deed given by Robert L. Flippin to Lula C. Borum purported to convey a fee, and was valid upon its face. That both of the deeds just referred to purported to be warranties and as such were valid upon their face. That Robert L. Flippin under his deed from Mary Georgiana Kidd went into immediate possession and held said land for 10 years in actual, notorious, and exclusive possession, and during such time did not recognize or admit the title of the respondents or any other party, but, on the contrary, denied that any person whatsoever had any rights in and to said land. That Lula C. Borum has been in actual, notorious, continuous, and exclusive possession of the land during the time since she went into possession more than 20 years prior to the filing of her bill, and that during said time she has not recognized or admitted any right, title, or interest of the respondents. That Robert L. Flippin and Lula C. Borum have paid the taxes upon said land during the time aforementioned. That the two deceased devisees, James W. Kidd and Anna Philida Kidd, died intestate, and left no debts. That the original will and trust are offered in evidence as a part of the facts of the case and evidence of the cause. That said original will and trust deed be received in evidence as if fully incorporated in this statement of facts. That the copy of the will (Exhibit A) attached to the answer of the respondents is

[Kidd, et al. v. Borum.]

correct, except that there are no punctuation marks in the third item of the will beginning with the words, 'I hereby give and bequeath unto my said beloved wife' and down through the said item of said will. That a true and correct copy of the trust deed made by John W. Kidd contemporaneously with the execution of the will is hereto attached as an exhibit to and as a part of this statement of fact. That same may be considered as the original trust deed. That same is marked 'Exhibit I.' That, if the original will and trust deed are not produced, the copies attached may be received as evidence the same as the originals, with the above qualifications as to the punctuation of the will. That the respondents as devisees under said will, and as heirs at law of the deceased devisees in said will, claim a valid and subsisting vested remainder under said will to the lands in controversy."

The following is the deed of trust: "This indenture made and entered into this 8th day of November in the year of our Lord 1858, between John W. Kidd, of the first part and John M. Kidd and William Singleton, of the second part, all of the county of Shelby, state of Alabama, witnesseth: That whereas, the said John W. Kidd, the party of the first part, has been twice married and has children by each marriage; that his children by his first marriage have all grown up and left him, and he has by way of advancement, given off to them a considerable portion of his estate, and is desirous to provide for his present wife and children by her. Now, for and in consideration of the love and affection which the said party of the first part has and bears for his present wife, Mary Georgiana Kidd, and my sons by my said beloved wife, William Douglas, James White, and daughter Anna Philida, and the further consideration of five dollars by the parties of the second part to me, the party

[Kidd, et al. v. Borum.]

of the first part, in hand paid, the receipt whereof is hereby acknowledged, the said party of the first part has sold and does hereby sell and convey unto the said parties of the second part the following described lands and property, to wit: All of my home tract of land lying near and adjoining the town of Harpersville, and embracing section (32) in township (19) and range (2) east, except a small portion sold off as town lots and the graveyard and forty acres in section four, and forty acres in section five, and seventy-six acres in section twenty-eight, and seventy-six acres in section thirty-three, all in township 20, range 2 east; my entire home tract containing eight hundred and sixty acres; and the following named negro slaves, to wit: a negro woman, Martha, about 30 years old, and her five children, William about eleven years old, Martha about eight years old, Elbert about six years old, Sallie about four years old, and Smith about three years old. Also Mark, a man about 30 years old, and Early about 17 years old, and Charles about 15 years old, and Franklin about 20 years old, and Isiah about 22 years old, and Emma about 16 years old, and Elijah about 60 years old. To have and to hold in trust as follows, to wit: in trust for the use, support and maintenance of said beloved wife Mary Georgiana, and children William Douglas, James White, and Anna Philida, during the natural life of my said wife, remainder after her death in absolute right to my said children above named, and in the event my said wife should have any other child, or children by her present marriage, that such child or children born of my said wife by her present marriage, that it or they be made equal with my children above mentioned in said property, but in no event said property or any part thereof, to go to any future husband, should my said beloved wife have such future husband,

[Kidd, et al. v. Borum.]

or to the children of such future husband, so as however not to restrain her of the use of the said property during her natural life. In further trust that I be permitted to retain the use of said land and negroes during my natural life. I also hereby authorize and empower the said parties of the second part and in the event they or either of them should die, resign this trust, or be otherwise removed from the trust herein created, their successors to demand and recover of my executors any legacy or bequest which I may give to my beloved wife and children above named in my last will and testament and when received of my executors or administrators to be held by said trustees for my said wife in the same manner and under the same trust as above provided. John W. Kidd. Attest: R. L. Flippin, S. Leeper."

The following is the will:

"I, John W. Kidd, of the county of Shelby state of Alabama, of sound mind and memory, though advanced in age and mindful of the uncertainty of life, do make and publish this my last will and testament. And first I commend my soul to God, who gave it, and my body to the dust to be buried as my friends may choose in a Christian way and manner; second, I desire that all my just debts and funeral expenses be paid out of any money which may be on hand at my death, or out of the first means which may come to the hands of my executors out of my estate; third, whereas, I have in the providence of God been twice married and have children by each marriage. My first children have all left me and have, by way of advancement, received a part of my estate hereinafter more particularly set forth, and I have by deed heretofore conveyed to my beloved wife, Mary Georgiana, and my children by her, through John M. Kidd and William Singleton, trustees, and in that

[Kidd, et al. v. Borum.]

deed given to said trustees power and authority to demand of my executors such legacy or bequest as I might, in my will, give to my said beloved wife and children in said deed mentioned now, hereby ratifying and confirming said deed, and as the bequests therein alluded to, I hereby give and bequeath unto my said beloved wife whatever real estate I may die seized and possessed of, situated in Shelby county; and four mules and one horse to be selected by said John M. Kidd and William Singleton out of my stock of mules and horses at my death, four cows and calves, thirty hogs, selected in like manner, and four beds and furniture to be selected by my said wife, and direct that my executors convey to said trustees said land, if any such be owned by me at my death, and deliver to them all the above mentioned property for the use of my beloved wife, Mary Georgiana, and her children William Douglas, James White and Anna Philida, during the natural life of my said beloved wife, and at her death to our children forever. I also give to my beloved wife one buggy and harness and wagon. Fourth, I have heretofore given to my children, as follows: to my daughter Harriet McGraw to the value of \$4987.00; to my daughter Marie Johnston to the value of \$3374.00; to my daughter Louisa Gashell, \$282.00; to my son Albert J. Kidd to the value of \$4235.00; to my son William H. Kidd, to the value of \$5512.00; to my son John M. Kidd, to the value of \$2840.00; and design in my life time in my own way, to make my said children equal as to said advancements. Now it is my desire that my entire estate, not above bequeathed, of which I may die seized and possessed, be equally divided among my said sons and daughters mentioned in this section, and here enjoin it upon my executors hereinafter appointed to divide my said property so left after taking out the foregoing specific be-

[Kidd, et al. v. Borum.]

quests, so as, first, if I, in my life time, shall have failed to equalize such advance, then to equalize said advances, and then divide said remainder equally between my sons and daughters named in this fourth section of this my will, who may be living at my death, and to the children of such as are or may be dead, the share due their parents. Fifth, I hereby appoint my sons, Wilson M. Kidd, and John M. Kidd my executors of this my last will and testament, and hereby convey to them and invest them, or such of them as may qualify with full power to do all things necessary to carry out this my last will and testament; and I now publish this as my last will and testament in the presence of," etc.

KIDD & DARDEN, and W. S. THORINGTON, for appellant. The Code of 1852, was in force when the deed made by the testator to the trustees was executed, and section 1329, expressly authorized such a reservation. The will and the deed being executed contemporaneously they necessarily shed light, the one on the other, and embodied the intent and purposes of the grantor, and hence, will be considered together.—*Matthews v. McDade*, 72 Ala. 377. There were two estates created, one for and during the life of the mother, and another an estate in remainder to her children, and they took jointly and equally as tenants in common for and during the life of the mother subject to open and letting in of any child afterwards born with the possession of the life estate postponed according to the reservation in the deed.—*Chandler v. Jost*, 81 Ala. 411; *Blakney v. Dubose*, 167 Ala. 627. There could be no merger where there is an outstanding life estate.—6 Mo. App. 297; 7 Allen. 196; 2 Washburn on Real Property, 368. To hold that the life estate of the children were merged or drowned in their remainder in fee would not only

[Kidd, et al. v. Borum.]

do violence to the intent of the testator, but be equivalent to holding that the children had no present right of possession, and have had none since the death of the grantor.—Authorities next above. In the vested remainder the children took jointly, equally and immediately, subject to the rights of children afterwards born with the right of possession of the fee postponed until the death of the mother, or the termination of the life estate.—*Dunn v. Bank of Mobile*, 2 Ala. 152; *Chandler v. Jost*, *supra*; *Sullivan v. McLaughlin*, 99 Ala. 60; *Blakeny v. Dubose*, *supra*. It is immaterial whether the trust created by the deed created an active trust or a naked trust.—*McBrayer v. Cariker*, 64 Ala. 50. It is absolutely clear that the mother had only a life estate jointly with her said children in the property, and that was all she could sell.—*Chandler v. Jost*, *supra*; Sec. 1313, Code 1852; *Pendley v. Madison*, 83 Ala. 484. Her grantees then became tenants in common with the children in the life estate, and as such went into possession of the whole property, and not otherwise.—*Coleman v. Stewart*, 170 Ala. 255; *Fielder v. Childs*, 73 Ala. 567. Hence, her grantee, and those holding under her could not hold adversely to the remainder interest of the respondent children, and the remaindermen were under no duty to bring any suit to protect their remainder interest until the death of the life tenant, who is shown by the facts to be still in life.—Sec. 3420, Code 1907; *Pope v. Pickett*, 74 Ala. 122; *Blakeny v. Dubose*, 167 Ala. 627. If the agreed statement of facts show an adverse holding by Flippen and his successors in title against respondents in respect to their life interest, that interest may be barred both by statute and prescription, but cannot bar the remainder interest while the life tenant is alive.—*Blakeny v. Dubose*, *supra*. As to what constitutes an ouster between tenant in com-

[Kidd, et al. v. Borum.]

mon, see *Layton v. Campbell*, 155 Ala. 220; *Farley v. Nagle*, 119 Ala. 622; *Ashford v. Ashford*, 136 Ala. 631; *Gulf Red Cedar Co. v. Crenshaw*, 148 Ala. 343.

BURGIN, JENKINS & BROWN, for appellee. The bill was brought under section 5443, et seq., Code 1907, and the statutory averments are properly pleaded.—*Adler v. Sullivan*, 115 Ala. 582. The principles announced in the following cases apply.—*Woodstock Co. v. Fullender*, 87 Ala. 586; *Robinson v. Pearce*, 111 Ala. 273, but conceding that time has not foreclosed all respondent's rights, the will conveys a fee to the wife.—Sec. 1299, Code 1852. If it be granted that the children had a legal estate, then it amounted to a tenancy in common, and the children are barred.—*Dunn v. Bank*, 2 Ala. 162; *McQueen v. Logan*, 36 Ala. 21; *Slaton v. Blount*, 93 Ala. 275; *Moore v. Lee*, 105 Ala. 435. The description of the property devised is indefinite, and the gift must fall.—*Zundel v. Baldwin*, 114 Ala. 328. The land did not pass under the will.—*Carter v. Carter*, 39 Ala. 579. If the legal title passed to the trustees, the trustees are barred, and hence, the respondents are also barred.—*Haney v. Legg*, 129 Ala. 619. There is an additional brief filed without signature insisting that the above case is fictitious and moot, and should not be considered by this court.—140 Ala. 458; 156 Ala. 625; 169 Ala. 644; 17 U. S. 93; 12 Law. Ed. 1067; 12 L. R. A. 820; 2 Cyc. 533.

SAYRE, J.—In 1911 appellee filed her bill under the statute to settle the title to lands held by her. The cause was submitted on proof of the will of John W. Kidd, back to whom all parties trace their titles, a certain deed of trust executed by him, and an agreed statement of facts, all which, so far as necessary to an under-

[Kidd, et al. v. Borum.]

standing of the case, will be set out elsewhere. From the decree defining and settling the respective interests of the parties defendants have taken this appeal.

As will appear, in 1858 John W. Kidd executed and delivered the deed purporting to convey to trustees, upon the trusts therein set down, certain lands other than those in controversy. On the same day, but following the execution of the deed, Kidd executed his will, which was duly probated after his death in 1865. This deed, which was duly acknowledged and recorded, though it was testamentary in that part which authorized the trustees therein appointed to demand and receive of executors to be appointed any legacy or bequest which the grantor might give to his wife and the children of his second marriage, was not probated as a part of the will. It cannot therefore be recognized as a substantive part of the will.—*Wood v. Mathews*, 53 Ala. 1. However, regard may be had for its disposition in the construction of doubtful provisions of the will as constituting a part of all those attendant circumstances to which the court will look in order to learn the true intent and purpose of the testamentary language used, though such provisions as may be clearly located and ascertained within the four corners of the instrument cannot be affected or changed by considerations aliunde. In part at least the instrument of first execution was not of testamentary character, for it operated in presenti to pass title to the property therein described, though postponing possession, and was as to that title and its limitations not revocable. The nearness of the two acts to one another, their common purpose to make provision for the second wife of the grantor-testator and his children by her, and the reference of each to the other, lead the court, as far as may be without transgressing established rules of law for the transmission

[Kidd, et al. v. Borum.]

of property, to take them as one.—*Matthews v. McDade*, 72 Ala. 377. The will was not drawn by a skillful hand, and, standing alone, its provisions are to some extent contradictory and of doubtful import in respect to the estate conferred upon the widow. But, when considered in connection with the deed, it makes, in our judgment, the widow and her children at the time of testator's death tenants in common of an estate for her life (*Chandler v. Jost*, 81 Ala. 411, 2 South. 82), with the remainder in fee of the whole estate to all her children. These purposes and dispositions the testator intended and attempted to accomplish through the intervention of trustees. There was never any conveyance of the land in question to trustees; but whether the trust which the testator intended to create was a dry trust, or was of such character as to require activity and discretion of the trustees, equity will consider and treat the beneficial interest as having acquired the intended status in the first case because the trustees would have been useless incumbrances of the plan, in the second because no trust can be permitted to fail for lack of a trustee.

At one place in his will testator said: "I hereby give unto my beloved wife whatever real estate I may die seized and possessed of, situated in Shelby county." But the will must be construed as a whole, testator's intention being gathered from a consideration of all parts of it in connection, and in the forepart of the same sentence from which we have quoted above testator said: "Whereas I have in the providence of God been twice married and have children by each marriage. My first children have all left me and have, by way of advancement, received a part of my estate hereinafter more particularly set forth, and I have by deed heretofore conveyed to my beloved wife, Mary Georgiana, and my

[Kidd, et al. v. Borum.]

children by her, through John M. Kidd and William Singleton, trustees, and in that deed given to said trustees power and authority to demand of my executors such legacy or bequest as I might, in my will, give to my said beloved wife and children in said deed mentioned now, hereby ratifying and confirming said deed, and as the bequests therein alluded to, I hereby give and bequeath," etc., using the language first above quoted. And he finished the paragraph with these words: "And direct that my executors convey to said trustees said land, if any such be owned by me at my death, and deliver to them all the above mentioned property for the use of my beloved wife, Mary Georgiana, and her children, William Douglas, James White, and Anna Philida, during the natural life of my said beloved wife, and at her death to our children forever." In the deed he had conveyed to the trustees named in the will a certain tract of land and other property, "To have and to hold in trust as follows, to wit: In trust for the use, support and maintenance of said beloved wife, Mary Georgiana, and children, William Douglas, James White, and Anna Philida, during the natural life of my said wife, remainder after her death in absolute right to my said children above named, and in the event my said wife should have any other child, or children by her present marriage, that such child or children born of my said wife by her present marriage, that it or they be made equal with my children above mentioned in said property, but in no event said property, or any part thereof, to go to any future husband, should my said beloved wife have such future husband, or to the children of such future husband, so as however not to restrain her of the use of said property during her natural life." And, finishing the deed, he authorized the trustees "to demand and recover of my executors any

[Kidd, et al. v. Borum.]

legacy or bequest which I may give to my beloved wife and children above named in my last will and testament and when received of my executors or administrators to be held by said trustees for my said wife in the same manner and under the same trust as above provided." That expression of the will, upon which appellee relies as creating a fee in the wife either in the whole or in a part of the lands devised, cannot be segregated from the rest of the will without violating an elementary rule of all interpretation, and so, considering the will as a whole and having recourse to the deed for the solution of doubtful provisions, we have reached the conclusion stated above.

The deed of the widow, Mary Georgiana, under which complainant holds and claims by mesne conveyance, though it purported to convey the entire estate in fee with covenants of warranty, was effective as a conveyance of her interest as a tenant in common for her life only.—*Coleman v. Stewart*, 170 Ala. 255, 53 South. 1020; *Fielder v. Childs*, 73 Ala. 567; *McMichael v. Craig*, 105 Ala. 382, 16 South. 883; *Hall v. Condon*, 164 Ala. 393, 51 South. 20. And that is now the extent and character of complainant's title, unless, by lapse of time coupled with adverse claim, a larger interest has become vested in her.

So far as concerns the term for the life of Mary Georgiana Kidd, who still survives, we think it has been lost to defendants. There is nothing in the agreed facts to indicate an assertion of title hostile to respondents prior to the sale by the widow to Flippin in 1880. The agreement is that "Flippin under his deed from Mary Georgiana Kidd went into immediate possession and held said land for 10 years in actual, notorious, and exclusive possession, and during such time did not recognize or admit the title of the respondents or any other party,

[Kidd, et al. v. Borum.]

but, on the contrary, denied that any person whatsoever had any rights in and to said land; that Lula C. Borum has been in actual notorious, continuous, and exclusive possession of the land during the time since she went into possession more than 20 years prior to the filing of her bill, and that during said time she has not recognized or admitted any right, title, or interest of the respondents; that Robert L. Flippin and Lula C. Borum have paid the taxes upon said land during the time aforementioned." These facts show a possession by complainant and Flippin hostile in its inception and exclusive during its continuance, such as would set the statute of limitations to running as against strangers and would ripen into title after 10 years. Customary acts of ownership are sufficient to impute notice to all not claiming in privity with the possessor. But the rule is that the possession of a tenant in common, without more, does not operate as a disseisin of cotenants, for in contemplation of law he holds for them.—*Fielder v. Childs*, 73 Ala. 567. To operate as a disseisin in such case there must be a repudiation of the rights of cotenants and a claim of exclusive ownership brought home to their knowledge; that is, there must be positive information of the facts, however informally communicated or acquired.—*Johns v. Johns*, 93 Ala. 239, 9 South. 419; *Ashford v. Ashford*, 136 Ala. 631, 34 South. 10, 96 Am. St. Rep. 82; *Palmer v. Sims*, 176 Ala. 59, 57 South. 704; *Lay v. Fuller*, 178 Ala. 375, 59 South. 609. Knowledge or actual notice of the conveyance by one tenant in common to a stranger purporting to convey the entire estate and amounting therefore to a repudiation of the trust relation incident to cotenancy, and possession taken under it, would put the statute in motion.—*Abercrombie v. Baldwin*, 15 Ala. 363. But the burden of tracing such knowledge or actual notice home to her

[Kidd, et al. v. Borum.]

cotenants, and, in general, of proving that the title shown by her muniments, including the will, had been enlarged by an adverse holding or the doctrine of prescription rested upon complainant, and a reference to the agreed facts, in the light of the principles of law stated, will show that complainant has failed to sustain that burden. She has failed to bring home to defendants information of the adversary character of her possession.

But another contention, resting upon principles different from those obtaining in cases to which the statute of limitations applies, must be taken into account. For more than 30 years complainant and her immediate grantor have been in possession without any recognition of the rights of defendants. During that time, it is to be inferred, defendants have enjoyed no benefit of their ownership, and for more than 20 years they might have taken or claimed possession and upon denial of their rights might have maintained an action in their own name and behalf. This court has repeatedly held that the lapse of 20 years, without recognition of adversary right, or admission of liability, operates an absolute rule of repose. Many of the cases are cited in *Jackson v. Elliott*, 100 Ala. 669, 13 South. 690, where the question of the application of the doctrine of prescription to a case between tenants in common was put aside because not raised by the record in such form as to require consideration. A reading of these cases leads us to the conclusion that, as to the estate for the life of testator's widow, defendants have been barred by a failure for more than 20 years to assert their rights. In the meantime complainant and her immediate predecessor in title have been in the uninterrupted and unquestioned possession of the land and in the like enjoyment of its undivided usufruct without the slightest

[Kidd, et al. v. Borum.]

recognition of the right now asserted by defendants. In such a case the court, for the repose of society, will presume any state of the title in order to maintain a status of parties and property so long allowed to remain undisturbed.

The estate in remainder must be disposed of on still different principles. As to that, defendants have never at any time been in a position to ask for any judgment or decree presently operative upon the possession of the property or the enjoyment of its usufruct. In such case laches cannot be predicated on the ground of mere delay because there can be no delay where there is no right to move. In such case the remainderman cannot be barred pending the life estate by the statute of limitations, nor is there field for the operation of the doctrine of prescription. See the cases cited in *Jackson v. Elliott, supra*, and our recent case of *Winters v. Powell*, 180 Ala. 425, 61 South. 96.

It follows that, as between the parties, complainant is entitled to an unincumbered estate in the entire property for and during the life of Mary Georgiana Kidd. As to the remainder, upon the birth of John M. Kidd, he became entitled to share equally with William, James, and Anna Philida, each taking a fourth. On the death of Anna Philida in 1887, intestate, unmarried, and without children, her undivided fourth in the remainder devolved under the statute then in force on her three surviving brothers, who thereupon became the owners of the entire interest in remainder in the proportion of an undivided one-third interest each. On the death of James W. in 1909 intestate, his third devolved upon his children Thos J., Meeda T., and James M., in the proportion of one-ninth each; and so the title stands at this time. In one particular the chancellor

[Peerson, et al. v. Danley.]

decreed differently; but a decree will be rendered here in accord with the views expressed.

Reversed and rendered.

DOWDELL, C. J., and McCLELLAN and SOMERVILLE, JJ., concur.

Peerson, et al. v. Danley.

Bill to Rescind and Cancel a Conveyance, Remove a Trustee, and to Restore Lands to Proper Trustee.

(Decided February 6, 1913. 61 South. 302.)

Equity; Bill; Multifariousness.—A bill by a complainant who is a joint owner of land devised in trust to her and her two brothers, seeking to cancel a conveyance of her interest in the land to one of her brothers on the grounds of fraud and misrepresentation, and to have one who has acted as agent of the trustee remove from his position is multifarious, since no connection is shown between the two causes of action.

APPEAL from Lauderdale Chancery Court.

Heard before Hon. WILLIAM H. SIMPSON.

Bill by Lillian P. Danley against Rufus Peerson and another, to rescind and cancel a conveyance for fraud, to remove a trusteeship, to cancel and annul a written agreement, and to have the lands restored to the real trustee. From a decree overruling demurrers to the bill, respondents appeal. Reversed, rendered and remanded.

A. A. WILLIAMS, for appellant. The bill is multifarious.—*Howard v. Corey*, 126 Ala. 283. The bill improperly joins parties respondent.—*O'Bear J. Co. v. Volfer*, 106 Ala. 205. Counsel discusses other matters, but in view of the opinion, it is not deemed necessary to here set them out.

[Peerson, et al. v. Danley.]

GEORGE P. JONES, for appellee. No brief reached the Reporter.

SOMERVILLE, J.—Complainant; as joint owner with her two brothers of certain lands devised to them in trust by their grandfather, seeks: (1) To rescind and cancel a conveyance of her interest in the lands made by her to one of her said brothers and procured from her by false and fraudulent representations; (2) to have removed from the trusteeship (?) of the lands one James M. Peerson, her uncle, who it is alleged took possession of and controlled said lands and collected the rents, income, and profits, under some contract or agreement with the real trustee, who is complainant's mother; (3) to have delivered up and canceled the written agreement under which said J. M. Peerson acted as agent for the trustee in that behalf; and (4) to have the lands restored to the said real trustee to hold and manage under the provisions of the will. The two joint owners (the brothers), the real trustee (the mother), and the de facto trustee (the uncle) are made parties defendant to the bill.

Without undertaking to discuss the sufficiency of the allegations of the bill in respect to the several reliefs prayed, it will suffice, for present purposes, to say that the bill shows no connection whatever between complainant's equity to have rescission and cancellation of the deed as against Rufus Peerson, and her equity as cestui que trust to have J. M. Peerson removed from his position of agency to the trustee, and to have the lands restored to such trustee. They are distinct, unrelated rights, and their conjunction in this bill unquestionably renders it multifarious.

This ground of demurrer was interposed by each of the respondents who appeal, and the demurrers should

[Lovell v. Felkins.]

have been sustained. A decree will be here rendered sustaining the respective demurrers of appellants as to multifariousness, and the cause remanded for further proceedings in the chancery court.

Reversed, rendered, and remanded.

DOWDELL, C. J., and MCCLELLAN and SAYRE, JJ.,
concur.

Lovell v. Felkins.

Bill to Enforce a Trust.

(Decided February 13, 1913. 61 South. 262.)

1. *Trusts; Resulting; Right to Enforce.*—Where land was owned in undivided interests by a mother and her son, and the mother was illiterate and reposed absolute confidence in her son, and he misled her to believe that their common funds had been used to discharge a lien against the lien, when in fact, he permitted the land to be sold under the lien to one from whom he afterwards purchased in his own name and without his mother's knowledge, the mother's right to enforce a trust as to a one-half interest in the proceeds of the sale, made by the son, is shown.

2. *Same.*—Under the facts in this case, the complainant had a reasonable time, after discovery of the fraud, within which to file a bill to enforce the trust.

APPEAL from Walker Circuit Court.

Heard before Hon. J. J. CURTIS.

Bill by Jane Felkins against John H. Lovell, praying a decree to enforce a trust in the lands and in the notes and mortgages given to secure deferred payments, for an accounting, and for general relief. From a decree overruling demurrers to the bill, respondent appeals. Affirmed.

ERNEST LACY, for appellant. The bill did not sufficiently allege the fact constituting the fraud.—*Bell v. Son. H. B. & L. Co.*, 140 Ala. 377; *Scholze v. Steiner*,

[Lovell v. Felkins.]

100 Ala. 152. Constructive trusts are barred after ten years.—*Parks v. Lide*, 135 Ala. 131. The facts here stated do not show a resulting trust.—*Bibb v. Hunter*, 79 Ala. 351. The bill does not offer to do equity.—*Marks v. Clisby*, 130 Ala. 502. One tenant in common is not liable to another for rents.—*West v. West*, 90 Ala. 453; *Gayle v. Johnson*, 80 Ala. 395.

GUNN & POWELL, for appellee. Complainant had a reasonable time after the discovery of the fraud within which to file a bill.—*Randolph v. Vails*, 180 Ala. 82. The facts sufficiently show fraud, and a right in complainant to have a resulting trust in the property enforced.

DE GRAFFENRIED, J.—Jane Felkins, who is an illiterate woman, is the mother of John H. Lovell. The mother and the son appear to have lived together in the same house, on 406 acres of land which they bought from J. C. Johnson and wife on the 15th day of November, 1890. The deed from Johnson and wife to said parties recites a consideration of \$1,700, and the deed conveys the land to said parties as tenants in common, each to own and possess an undivided one-half interest in said land.

It appears that said parties did not pay all of the purchase money for the land, and that on or about the 8th day of February, 1893, the said Johnson filed his bill in the chancery court of Walker county against said parties for the purpose of establishing a lien upon the said lands for the payment of the unpaid purchase money, and of having the lands sold for its payment. It appears that the said cause regularly proceeded to a final decree in which it was decreed that said Johnson had a vendor's lien upon the said land for the sum of \$171.90 and the costs, and the lands were ordered to

[Lovell v. Felkins.]

be sold for the payment of said amount and the costs. It appears that the lands were sold by the register, under the orders of the chancery court, for the satisfaction of the decree, on the 26th day of August, 1895, and that E. O'Rear bought the lands at the sale for the sum of \$208.10, and that the lands were regularly conveyed to the said O'Rear by the register, under the orders of the chancery court, by a deed dated August 26, 1895. It further appears that on April 12, 1897, E. O'Rear and wife conveyed the said lands to John H. Lovell by a deed which recites a consideration of \$175, and that on the 30th day of August, 1911, John H. Lovell and wife conveyed the said lands to G. T. Taylor in consideration of \$200, and \$3,550 to be paid in the future; the payment of the \$3,550 being secured by a mortgage on said lands.

1. This bill was filed by Jane Felkins, the mother, against the said John H. Lovell, the son, and prays that she be decreed a half interest in the purchase price of said lands, and that she be decreed to be a half owner in said deferred purchase money of \$3,550, and for other appropriate relief.

Mrs. Felkins alleges in the bill that she is illiterate; that she reposed perfect confidence in her said son; that she lived with him in the same house on said land from the time they bought it until it was sold by her son on August 30, 1911; that she knew that there was a balance due Johnson on the lands, and knew that Johnson sued them for said balance and had obtained a decree ordering the lands to be sold for the amount so due him; that it was agreed between her and her son that he should "take the rents, income, or proceeds of the crops of said land to satisfy and pay off said indebtedness;" that her said son "did take so much of the crops, rents, or incomes of said lands and left home to

[Lovell v. Felkins.]

go to Jasper, the county seat, to pay off said amount;" that she "owned and was entitled to an undivided one-half interest in and to said land, crops, incomes, or proceeds of said crops or incomes; that she trusted her said son to apply the crops or incomes, or proceeds of said crops or incomes, to the payment of said decree;" that, in utter disregard of his agreement, the son did not apply said crops, rents, or incomes to the payment of said decree, but that he, without her knowledge, permitted the lands to be sold and bought by O'Rear; that he afterwards repurchased the lands from O'Rear without her knowledge; and that she knew nothing of the sale of the lands under the above-mentioned decree or of the O'Rear purchase, or of the sale by O'Rear to her son until her said son, on August 30, 1911, sold the said lands to said G. T. Taylor.

If the allegations of the bill are true, Mrs. Felkins was, from the summer of 1895 to August 30, 1911, kept in blissful ignorance by her son of the fact that he did not, on the occasion above mentioned, when he went to Jasper, pay off the decree, or that the lands were ever sold, or that her title to an undivided one-half interest was in any way involved. If the allegations of Mrs. Felkins' bill are true, her son perpetrated a fraud upon her; and a court of equity is the court to which she has a right to appeal for the proper relief.

She had a reasonable time, after the discovery of the fraud, within which to file the present bill. This she has done.—*Randolph v. Vails*, 180 Ala. 821, 60 South. 159.

The demurrers to the bill were not well taken. The decree of the court below is affirmed.

Affirmed.

DOWDELL, C. J., and ANDERSON and MAYFIELD, JJ.,
concur.

[Jackson Lumber Co. v. Bass, et al.]

Jackson Lumber Co. v. Bass, et al.

Bill to Reform Instrument, and for Specific Performance.

(Decided February 13, 1913. 61 South. 271.)

1. *Husband and Wife; Conveyance by Wife; Joinder.*—Under section 2707, Code 1876, a married woman could not convey her property without the husband joining therein, even though the husband was out of the state or had abandoned her, unless she had become a feme sole under the provisions of sections 2723, 2834, Code 1876.

2. *Specific Performance; Deed by Wife.*—Where the deed would be void because the husband did not join under section 2707, Code 1876, specific performance of the delivery of a deed by a married woman will not be granted.

3. *Reformation of Instruments; Validity After Reformation.*—A deed by a married woman will not be reformed as to the grantee named therein where, after reformation the deed would be void, because of the failure of the husband to join therein as required by section 2707, Code 1876.

APPEAL from Covington Chancery Court.

Heard before Hon. L. D. GARDNER.

Bill by the Jackson Lumber Company against W. H. Bass and others to reform a deed and for specific performance. From a decree sustaining a demurrer to the bill, complainant appeals. Affirmed.

The bill shows that the 160 acres involved was entered by John D. McRae in the year 1858, and that during the year 1861 the said McRae left home in 1861 or 1862, and entered the war between the states, and died in 1865 before returning home; that he left surviving him a widow, Mary A. McRae, now Mary Gadsden; that after the death of McRae the only child of McRae and his wife died, and the wife became invested with the title to the land, and that shortly after the death of the child McRae's widow married one Parker, and was Mary A. Parker at the time she executed the deed re-

[Jackson Lumber Co. v. Bass, et al.]

ferred to; that the deed was made in 1868, and at the time said deed was executed Mary Parker's husband had abandoned her, or was out of the state, and that for some reason unknown to complainant the trade between Mary Parker and Hart was never consummated, and the deed never delivered; that some three or four years after the War, the exact date not being known, Mrs. Parker and one Jordan made a trade with reference to this same land, in which it was agreed and understood that title was to be made to said Jordan, and that said Jordan paid the consideration, and, all parties thereto being ignorant, the said Mary Parker delivered to said Jordan several papers connected with the land, one of which was a patent, and the deed previously prepared by her to Hart, all with the intention of carrying to said Jordan the legal title. The bill then alleges the several parties through which the land passed until it reached the present complainant. The bill then alleges a purchase by W. H. Bass of the land from Mary Parker for a nominal consideration, with knowledge that the Jackson Lumber Company claimed the land by purchase, and that, under that purchase, Bass went on the land in the year 1896 or the early part of 1897, erected a cabin thereon, and laid claim to it. The prayer of the bill is to reform the deed made from Parker to Hart so as to divest title out of Parker and vest it in Jordan, or to specifically perform the contract made by Mary A. Parker with Jordan, and a prayer for general relief. The demurrers raise the questions decided in the opinion, together with that of laches and staleness of demand.

W. O. MULKEY, for appellant. The case as presented by the bill makes it apparent that the parties intended the legal title to the land should go to Jordan,

[*Jackson Lumber Co. v. Bass, et al.*]

and equity should give the effect to such intention, notwithstanding it was a mistake in law and not in fact, as the mistake involves fact as well as law.—34 Cyc. 911; 119 Ala. 340; 72 Ala. 14; 69 Ala. 468; 21 Ala. 252. Our court is committed to the doctrine that equity will reform contracts so that the contracting parties may be placed in the position intended by both although the reformation deals with mistakes of law.—38 Am. Dec. 733; 39 Am. St. Rep. 833; 5 L. R. A. 712; 21 Am. St. Rep. 74; 59 Conn. 117; 119 Ala. 344; 114 Ala. 582. Mere lapse of time itself will not produce such laches as will prevent relief.—*Bank v. Nelson*, 106 Ala. 542. The statute of limitations did not begin to run, nor can laches be imputed until the disavowal and repudiation of the trust.—*Clements v. Cox*, 114 Ala. 350; *Bank v. Nelson, supra*; *Ashurst v. Peck*, 101 Ala. 508; *Shorter v. Smith*, 56 Ala. 208; *Jones v. Gaynor* in MSS.

J. MORGAN PRESTWOOD, for appellee. It is evident under the bill that complainant is dodging the shadow of the authority of *Bass v. Jackson L. Co.*, 169 Ala. 455. Under the facts alleged in the bill the complainant is unquestionably guilty of laches, and the court properly sustained demurrer raising this question.—*Peacock v. Bethea*, 151 Ala. 141; *Cole's Case*, 143 Ala. 427; *Harris v. Ivey*, 114 Ala. 363; *Haggerty v. Elyton L. Co.*, 89 Ala. 428. The transaction was nothing more than a verbal transaction.—*Howells' Case*, 157 Ala. 43; *City L. Co. v. Poole*, 149 Ala. 164; *Robinson v. Driver*, 132 Ala. 169; *T. C. I. & R. R. Co. v. Linn*, 123 Ala. 123. Mrs. Parker was a married woman, and had not been made a feme sole under sections 2723-2734, Code 1876, and her husband did not join as required by section 2707, Code 1876, hence, the deed was void, and can

[Jackson Lumber Co. v. Bass, et al.]

neither be specifically performed, and if reformed as to the grantee, would still be void, so the question is one of law and not a mistake of fact, and hence, the court may not correct it.—4 Mayf. 191.

ANDERSON, J.—This bill seeks the reformation of a deed from Mary A. Parker to one Josiah Hart, which was not delivered to said Hart, so as to make one Jordan, to whom the land was sold and the said deed was delivered, the grantee therein, instead of the said Hart, or to have the contract of sale between the said Parker and Jordan specifically performed by the execution of a proper deed by the said Parker to Jordan. Construing the bill more strongly against the pleader on a demurrer thereto, the said Mary A. Parker was a married woman, both when the deed was signed in favor of Hart and when it was delivered to Jordan, and she was not joined therein by her husband; the excuse being that he had abandoned her, or was not then in the state. Under the law then in force, section 2707 of the Code of 1876 (section 2373, Code of 1867), the property of the wife could only be sold by the husband and wife, and conveyed by them jointly, by instrument in writing, attested by two witnesses or acknowledged. The sales to Hart or Jordan not having been made as required by the then existing statute, but being by the wife alone and not jointly with her husband, were void.—*Hammond v. Thompson*, 56 Ala. 589; *Alexander v. Saulsberry*, 37 Ala. 375. The statutes then controlling made no provision for the conveyance of the wife's property without being joined by the husband, notwithstanding he was out of the state or had abandoned her, unless she became a feme sole under the terms of article 4, pt. 2, c. 1, Code 1876, pp. 648-650.

[Galliland, et al. v. Williams, et al.]

Counsel for the appellant concedes that this condition will prevent a specific performance of the contract, but contends that it will not prevent a reformation of the Hart deed so as to make Jordan the grantee. Whether or not this was such a mistake as would authorize a reformation of the contract we need not decide, for it may be conceded that the same could be reformed, yet a reformation can work no benefit to this appellant. The deed before and after reformation would be the sole act of the wife, and, not being joined by her husband in the contract of sale or the deed to Hart or in the sale to Jordan, both transactions were void. Reformation will not be granted if it would be futile.—*McCrary v. Williams*, 127 Ala. 251, 28 South. 695. There can be no equity in a bill which invokes the power of the chancery court to do a vain and useless thing.—*Gardner v. Knight*, 124 Ala. 273, 27 South. 298.

The decree of the chancery court is affirmed.

Affirmed.

DOWDELL, C. J., and MAYFIELD and DE GRAFFENRIED, JJ., concur.

Galliland, et al. v. Williams, et al.

Bill for Cancellation of Mortgage and Subrogation.

(Decided February 6, 1913. 61 South. 291.)

1. *Mortgages; Record; Presumption of Notice.*—In an action against the grantees of a decedent to set aside the transfer of property, and apply it to the payment of a claim arising out of a sale by decedent to the complainant of a mule which complainants were held to have converted at the suit of the mortgagee under a mortgage given by decedent, and recorded in another county, the presumption will be indulged that the record afforded complainants constructive notice of the mortgage, where the bill fails to aver facts showing the contrary, notwithstanding an averment of want of actual knowledge of

[Galliland, et al. v. Williams, et al.]

the mortgage; and also that the location or removal of the animal after the mortgage was recorded did not deprive the recordation of its effect as constructive notice.

2. *Same; Constructive Notice.*—Where the adjudication of a conversion by complainant of the property at the suit of the mortgagee is set forth in the bill seeking to set aside the transfer by a decedent of his property to the mortgagee and apply it to the payment of a claim arising out of the sale to complainant by decedent of the property in question, would indicate notice of the mortgage, though recorded in another county, constructive notice will be presumed, since a judgment for conversion could not have been rendered if the complainants had been legally without notice of the mortgage when they purchased the property.

3. *Equity; Subrogation; Marins; Right to.*—One who seeks to have the doctrine of subrogation applied must come into court with clean hands; hence, where the purchasers of a mule did not pay the debt which the mule was mortgaged to secure, but were found guilty of conversion at the suit of the mortgagee, they cannot be subrogated to the claim of the mortgagee against the mortgagor, although without actual notice of the existence of the mortgage.

APPEAL from Clay County Court.

Heard before Hon. E. J. GARRISON.

Bill by C. H. Galliland and others, against J. F. Williams and others, to be subrogated to rights under a mortgage, and for cancellation. From a decree sustaining demurrers to the bill, complainants appeal. Affirmed.

RIDDLE, ELLIS, RIDDLE & PRUET, for appellant. In filing the bill in this cause complainants pursued the only remedy they had.—*Halfman v. Ellison*, 51 Ala. 543. The vendee is entitled in equity to subrogation.—4 Mayf. 868. The conveyance is void because made with intent to hinder or delay.—Sec. 4293, Code 1907, and authorities cited.

CORNELIUS & GAY, for appellee. The mortgage was properly recorded where the property was located and constituted constructive notice to all the world until the expiration of three months after the removal of the property to another county.—*Williams v. Vining*, 43

[Galliland, et al. v. Williams, et al.]

South. 744; sec. 999, Code 1896. The bill failing to show that complainants purchased the property after the expiration of three months from its removal, and also failing to show that the mortgage was not recorded in the county to which the property was removed, the presumption will be indulged that they had constructive notice of the mortgage, and having committed a wrong by the conversion of the property, were not entitled to subrogation.—*Starkes v. Bernheim*, 102 Ala. 466; 3 Ala. 352; 27 A. & E. Enc. of Law, 202. The bill was multifarious.—*Green, et al. v. Wright, et al.*, 49 South. 320; *Henry v. Tenn. L. S. Co.*, 50 South. 1029. Nolan elected to sue Galliland when he could have sued both Galliland and Williams, and Galliland cannot now be subrogated to Nolan's right to bring trover against Williams, since it has been waived.—*Vandiver v. Pollak*, 107 Ala. 551; *Smith v. Gayle*, 58 Ala. 600.

McCLELLAN, J.—The decree appealed from sustained the demurrer to the appellants' bill against appellees. The bill, in substance, shows this: In the year 1905 appellants were constituted a partnership doing business at Goodwater, Ala. During the month of December, 1905, the firm bought of R. F. Williams a mule. The agreed price was \$100. This was paid by a credit of \$34 on an indebtedness due by Williams to the firm, and the remainder (which the bill alleged was \$60) in cash. This mule was at the time of this purchase subject to an unpaid mortgage given by R. F. Williams, to S. J. Nolen. This mortgage was executed on March 6, 1905, and the debt it was given to secure matured October 2, 1905. It was recorded in the probate office of Clay county, Ala., on March 7, 1905. From the copy of the mortgage exhibited with and made a part of the bill it appears that R. F. Williams resided

[Galliland, et al. v. Williams, et al.]

in Clay county, Ala., at the time of its execution, and that the mule in question was held ("situated") in Clay county, Ala. It is averred that "said mortgage indebtedness was never paid to the said S. J. Nolen," that S. J. Nolen "recovered a judgment against" appellants in a justice's court in Coosa county, "for the conversion of said mule for the sum of \$62 damages" and costs, which judgment appellants "were forced to pay," that that sum together with the necessary expense of an attorney's fee in defending the suit of Nolen was wholly lost to appellants. It is also averred that R. F. Williams died "during the years 1907 or 1908," that neither the firm nor its members knew, until the trover suit was tried, that said mortgage was due and unpaid or that it conveyed title to said mule, or that the mule so purchased was described in the mortgage. The right of appellants to be subrogated to Nolen's rights is asserted.

The bill then takes account of a deed executed August 16, 1907, by R. F. Williams to his sons, upon a recited consideration of \$557, and charges that conveyed substantially all of the grantor's property; that he was then insolvent, the grantees being aware of that fact; that such conveyance was fraudulent and void as to appellants, who were and are entitled to be made whole for the sums so lost to them through the judgment in trover against them, a judgment that followed the fraud practiced upon them by R. F. Williams in the sale of the mule as stated; that the conveyance of August 16, 1907, was made for the purpose of hindering, delaying, or defrauding the grantor's creditors of whom appellants were, because of purchase of the mule, an intent common to all of the parties to that conveyance, and that there was in reality no adequate consideration paid by the grantees. The prayer seeks the cancellation of

[Galliland, et al. v. Williams, et al.]

the conveyance as against appellants and other creditors, and the application of the property left by R. F. Williams to the discharge of the demands of appellants and other creditors. There is general prayer for relief. It does not appear from the bill whether the mule had been removed from Clay county more than three months before its sale to appellants.

In the absence of averments of fact sufficient to avoid the constructive notice the recordation of the mortgage in Clay county operated to give (*Williams v. Vining*, 450 Ala. 482, 43 South. 744), it must be assumed against the pleader on demurrer, and so notwithstanding the affirmative averment of want of actual knowledge on the part of the firm or its members of the existence of the mortgage covering this mule, that the animal's location or removal after the record of the mortgage in Clay county was not such as to deprive the recordation of the mortgage of the effect to impute to appellants constructive notice of the mortgage and of its charge upon the mule.

If the matter were otherwise doubtful, the adjudication set forth in the bill of the appellants' guilt of conversion would seem to invite and justify the conclusion that appellants had some character of notice of the mortgage sufficient to render them liable for the conversion of the mule described therein, for it is not to be supposed that judgment for the conversion could or would have been rendered against appellants if they had been legally without notice of the existence of the mortgage when they bought the mule.

The basis of the rights appellants would assert must be found, if at all, in the fact that they are entitled to be subrogated to Nolen's rights against R. F. Williams or his estate in consequence of the further fact that they bought, because of Williams' fraud, a mule on which Nolen held a mortgage, and for their adjudicated

[Galliland, et al. v. Williams, et al.]

conversion of the animal had to satisfy Nolen in damages.

It is generally accepted that one who seeks the benefit of the equitable doctrine of subrogation must come into court with clean hands; that a vendee cannot have relief under the doctrine if his status is the result of his own wrongful act, or of a wrongful act in which he participated, or of the wrongful act of one under whom he claims.—Sheldon on Subrogation (2d Ed.) § 44; *Boyer v. Bolender*, 129 Pa. 324, 18 Atl. 127, 15 Am. St. Rep. 723; *Johnson v. Moore*, 33 Kan. 90, 98, 99, 5 Pac. 406; *Rowley v. Townsley*, 53 Mich. 329, 339, 19 N. W. 20; *Railroad Co. v. Soutter*, 13 Wall. 517, 423, 524, 20 L. Ed. 543; *Farmers' Co. v. Carroll*, 5 Barb. (N. Y.) 613, 660; *Wilkinson v. Babbitt*, 4 Dill. 207, Fed. Cas. No. 17,668. It is said in this connection in the books that "he that hath committed iniquity shall not have equity"; that a "tort-feasor cannot make his own wrongful act the basis of an equity in his favor"; that the "doctrine of subrogation only applies to lawful and meritorious transactions." The case made by the bill falls within the class to whom equity will not accord subrogation. If appellants had paid the mortgage debt, thereby exonerating the chattel from the charge and satisfying R. F. Williams' debt, the doctrine might be invoked. The exaction made of them was in satisfaction of their own liability for their own wrong in converting Nolen's property. To allow them the aid of equity for their recompense would be to erect an equity, for their benefit, upon their wrong—a wrong that has been established in a tribunal and the judgment thereof satisfied.

The decree is affirmed.

Affirmed.

DOWDELL, C. J., and SAYRE and SOMERVILLE, JJ.,
concur.

[Gachet v. Morton.]

Gachet v. Morton.*Specific Performance.*

(Decided April 17, 1913. 61 South. 817.)

1. *Frauds; Statute; Pleading; Necessity.*—Where the pleading itself affirmatively shows that the contract sought to be specifically performed violates the statute of frauds, that question may be raised by demurrer as well as by plea.

2. *Specific Performance; Discretion of Court.*—The right to a specific performance of a contract is not a matter of absolute right; it rests in a measure at least in the sound judicial discretion of the court to be exercised according to the principles of equity.

3. *Same; Contract; Certainty.*—Before the courts will specifically enforce a contract it must be made to appear by the pleadings that the contract sought to be enforced is the real contract made between the parties, and not one which the court is asked to make for them, although one they ought to have made.

4. *Same; Variance.*—Where the bill alleged a contract for the purchase of lands for cash, payable at a fixed time, and the proof showed that the contract as alleged was substantially modified by the parties to provide for the payment only when the vendor's wife should join, she having refused to join in the conveyance, there was a material variance between the allegations of the bill and the proof.

APPEAL from Bullock Chancery Court.

Heard before Hon. L. D. GARDNER.

Bill by G. M. Gachet against A. M. Morton to specifically perform a contract for the sale of lands. Decree for respondent and complainant appeals. Affirmed.

NORMAN & SON, for appellant. Having failed to plead the statute of frauds, the chancellor ought not to have considered the statute in determining whether complainant was entitled to relief.—*Shakespeare v. Alba*, 76 Ala. 351; *Phillips v. Adams*, 93 Ala. 450; *Strouse v. Elting*, 110 Ala. 132; *Marsh v. Frick*, 1 Ala. App. 649. The statutory exception does not contemplate or require a payment of part of the purchase money contemporaneously with the letting in to possession.—*Powell v.*

[Gachet v. Morton.]

Higley, 90 Ala. 103; *L. & N. v. Philyaw*, 94 Ala. 465; *City L. & B. Co. v. Poole*, 149 Ala. 168. Counsel discuss the allegations of the bill and the evidence to support it, and insist that there is no variance of a material nature between the pleading and the proof, and that under the proof, there was implied in the contract the making of a good deed.—*Taylor v. Newton*, 152 Ala. 465; *Wilkie v. McGraw*, 91 Ala. 633.

TOM S. FRAZER, for appellee. The contract is not such that an action of law would lie for its breach, and hence, a bill for specific performance will not lie.—*Kent v. Dean*, 128 Ala. 600; *Boyce v. Simpson*, 90 Ala. 373. The contract never became complete as it was to be for cash on delivery of deed.—*Foley v. Felrath*, 98 Ala. 178; *McFadden v. Henderson*, 128 Ala. 131. Specific performance will not be decreed when the contract involves the performance of reciprocal obligations, and when the party signing is not bound.—*M. & T. R. Co. v. Faircloth*, 155 Ala. 575; *Chadwick v. Chadwick*, 121 Ala. 580; *R. E. L. Co. v. Mobile*, 109 Ala. 195. Specific performance is not a matter of absolute right, but rests in the sound judicial discretion.—*Norman v. Steward*, 53 Ala. 654. The contract should be clear and definite, as to terms and time.—*Johnson v. Kelly*, 51 Ala. 369; *Goodlett v. Kelly*, 74 Ala. 213. The bill shows on its face that the contract was violative of the statute of frauds, and hence, that question may be raised by demurrer.—*Trimble v. Craddock*, 93 Ala. 450. There was a variance between the contract alleged and that shown.—*Brown v. Weaver*, 113 Ala. 572; *Westbrook v. Hayes*, 137 Ala. 575; *Clark v. McBride*, 158 Ala. 280.

MAYFIELD, J.—This is a bill for specific performance of a contract for the sale of land. The contract

[Gachet v. Morton.]

sought to be enforced rests in parol; and is therefore in violation of the statute of frauds. Appellant, by his averments and proofs, seeks to take the case without the statute of frauds by bringing his case within the exception, in that a part of the purchase money was paid and the vendee placed in possession by the vendor. The case was submitted for a final decree on the pleadings and proof. All relief was denied the complainant by the chancellor; and from that decree this appeal is prosecuted.

After a careful review of the pleadings and proof, we are of the opinion that the chancellor reached a correct conclusion, and that his decree must be affirmed. Leaving out of consideration the question as to the statute of frauds, it is made to conclusively appear by the proof that the real failure to perform the contract alleged was due to the fact that the wife of the vendor would not join him in the conveyance to the vendee, so as to cut off her dower right in the lands. This insuperable obstacle, so far as the parties to this contract are concerned, was attempted to be avoided by having the court to ascertain the value of such dower right and abate the purchase price of the land to that extent, and as abated enforced, in accordance with the rules announced by this court in *Minge v. Green*, 176 Ala. 343, 58 South. 381. While there was a difference of opinion among the members of the court as to the equity of a bill seeking such abatement, and enforcement of the contract as abated, and as to the certainty and correctness of the rule announced by the court for that purpose, it is in this case unnecessary to again go into that question, for the reason that this case must be decided on principles which preclude the reopening of that question.

[Gachet v. Morton.]

It is true, as stated by appellant in his brief, that there was a failure on the part of respondent to plead the statute of frauds in this case. This, however, is not necessary when the bill on its face proclaims its own invalidity by expressly showing that it violates the statute. A respondent is never required to reiterate in his plea or answer that which is already affirmatively shown on the face of the bill. In such case he may test the sufficiency of the bill by a demurrer.—*Merritt v. Coffin*, 152 Ala. 474, 44 South. 622.

The right to specifically enforce the performance of a contract is not absolute. Its enforcement in a measure, at least, rests in the sound discretion of the court, a judicial discretion, of course, to be exercised according to the principles of equity. It has been held that contracts which will be thus enforced must be fair, must be reasonable, and must be just, and not attended with excessive hardships or injustice. Courts of equity have frequently refused to enforce contracts when it appeared that they were founded on mistake or surprise to such an extent that their enforcement would be inequitable.—*Tombigbee Co. v. Faircloth Co.*, 155 Ala. 575, 47 South. 88.

It is also a principle of equity jurisprudence that, before a court of chancery will specifically enforce a contract, it must be made to clearly appear to the court that it is thereby enforcing the contract which the parties made, and of this the pleadings must give distinct information. The court will not attempt to make a contract for the parties, and enforce it, even though it be one which the parties might and ought to have made.—*Homan v. Stewart*, 103 Ala. 654, 16 South. 35.

The proof in this case indisputably shows that the first parol contract which was made, and which is alleged in the bill, was subsequently modified by the

[Gachet v. Morton.]

parties, and modified on account of the refusal of the respondent's wife to join with her husband in the conveyance, the modification being that whereas the original contract of sale was for cash, payable at a time certain, the contract was subsequently changed to the extent of providing that the consideration should be paid only when the vendor's wife would join with the husband in the conveyance. This, of course, was a time very indefinite and uncertain. For this reason, we agree with the chancellor, both in his finding and in his decision and opinion, that there was a material variance between the allegations and the proof, such as to prevent relief under the existing bill. We do not mean to hold, however, that the complainant would have been entitled to a decree but for this variance. There are other reasons why he was not entitled to the decree, some of which it is unnecessary for us to mention, or to refer to in this opinion.

The learned chancellor who tried this case has written a full and able opinion in support of his decision; and, while we do not deem it necessary to go to the full length that the chancellor went in his opinion, we do concur fully in his conclusions and in his opinion in the main. In fact, there is very little in this opinion that is not said in the opinion of the chancellor.

Finding no error in the decree of the chancellor, we are of the opinion that his decree should be affirmed.

Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

[Realty Investment Co. v. City of Mobile.]

Realty Investment Co. v. City of Mobile.

Bill to Enjoin Issuance of Bonds.

(Decided February 4, 1913. 61 South. 248.)

1. *Municipal Corporations; Bond Election; Ballots; Constitutional Provisions.*—The courts will recognize the right to impose by constitutional provisions the form and contents of ballots to be used in an election to determine whether or not the municipality shall issue bonds.

2. *Constitutional Law; Construction.*—Constitutions are usually framed in a more general language than legislative acts, and should not always be construed by the same rules of construction, not generally being subject to the same technical constructions as the statutes.

3. *Courts; Stare Decisis.*—Under the rule of stare decisis expressions of opinions arguendo in a decided case do not bind the court.

4. *Municipal Corporation; Bond Election; Form of Ballot.*—Under the provisions of section 222, Constitution 1901, the ballots here used substantially complied with the constitutional form therein prescribed, and were sufficient, as a substantial compliance was all that was required.

(Anderson and McClellan, JJ., dissent.)

APPEAL from Mobile Chancery Court.

Heard before Hon. THOMAS H. SMITH.

Bill by the Realty Investment Company against the city of Mobile to perpetually restrain and enjoin the city from issuing or selling certain bonds. From a decree sustaining demurrers to the bill defendant appeals. Affirmed.

FOSTER K. HALE, JR., for appellant. The ballot used did not conform to the requirements of section 222, Constitution 1901, and hence, the election was of no avail, and the bond issue should be enjoined.—*Coleman v. Town of Eutaw*, 157 Ala. 327.

[Realty Investment Co. v. City of Mobile.]

B. BOYKIN BOONE, for appellee. The ballot was a substantial compliance with the requirements of section 222, Constitution 1901, and a substantial compliance is all that is required.—11 Am. St. Rep. 767; 33 Am. St. Rep. 626; Paine on Elections, sec. 498; 34 Ind. 425; 29 Ill. 54; 51 Miss. 305; 19 Ohio St. 25; 30 Am. St. Rep. 262; 18 S. W. 761; 100 Mo. 361; 129 N. Y. 394; 99 Ky. 37; 15 Cyc. 318; 100 Ia. 27; 81 Mich. 189.

SAYRE, J.—Section 222 of the Constitution contains this provision: “The Legislature, after the ratification of this Constitution, shall have authority to pass general laws authorizing the counties, cities, towns, villages, districts or other political subdivisions of counties to issue bonds, but no bonds shall be issued under authority of a general law unless such issue of bonds be first authorized by a majority vote by ballot of the qualified voters of such county, city, town, village, district, or other political subdivision of a county, voting upon such proposition. The ballot used at such election shall contain the words: ‘For bond issue,’ and ‘Against bond issue’ (the character of the bond to be shown in the blank space), and the voter shall indicate his choice by placing a cross mark before or after the one or the other.”

In this case the question whether there should be an issue was submitted to the people on a ballot in the following form:

OFFICIAL BALLOT.

Of the Election to be Held September 2nd, 1912, to Submit to the Qualified Electors of the City of Mobile, whether or Not the City of Mobile should Issue \$100,000 in Bonds to Extend Its Sanitary Sewer System in Said City.

[Italty Investment Co. v. City of Mobile.]

[] For	{ Proposed bond issue of \$100,000 bonds of city of Mobile to be sold for the purpose of extending its sanitary sewer system, said bonds to bear interest at five per centum per an- num, payable semi-annually, to mature thirty years from their date and to be paya- ble at the American Exchange National Bank in the city of New York, N. Y.
[] Against	

The proposition of this appeal is that the result of the ensuing election was void for that the official ballot failed to follow the form prescribed by the Constitution. That it did not follow that form with utmost exactness must be conceded. Whether it followed that form substantially, and whether a substantial pursuit of the constitutional form will satisfy all the purposes had in view when the Constitution was framed, or whether, on the other hand, the form must be followed with literal exactness, are the questions presented for decision.

We would not be understood as doubting that the presence in the Constitution of the provision for the form of the ballot to be used in such cases—so far as it is a form—is evidence enough of the fact that the framers of the instrument and the people in adopting it have regarded the provision as of high importance, and that a faithful observance of every essential of the rule prescribed is made mandatory alike upon the courts and officers of election. The right and power of the framers of the Constitution to judge for themselves, and without the supervision of the courts, just what precautions as to form were necessary to secure the

[*Realty Investment Co. v. City of Mobile.*]

essential thing desired, and the duty of the courts to obey, are beyond question. The provision is mandatory, therefore, in that it is not left optional with the officer preparing the ballot whether he will obey or not, nor is it permitted to the court to condone disobedience. Nevertheless, a form is a form whether prescribed by statute or by Constitution—it deals with the external shape and structure of things rather than their substance—and, except in cases where there is a lack of legislative power or a conflict between legislative effort and constitutional provision, it is as much the duty of the courts to obey the former as the latter. But there is a substance of forms even; that is, the law may require a substantial, as distinguished from a literal, pursuit of form. “It is to be known,” says Lord Coke, “that there are two manner of forms, sc., *forma verbalis* and *forma legalis*. *Forma verbalis* stands upon the letters and syllables of the act; *forma legalis* is *forma essentialis*, and stands upon the substance of the thing to be done, and the sense of the statute.”—*Beawfage’s Case*, 10 Co. 100; *Smith v. Allen*, 1 N. J. Eq. 43, 21 Am. Dec. 33. Constitutions usually deal with larger topics and are couched in broader phrase than legislative acts; hence their just interpretation is not always reached by the application of similar methods.—*Houseman v. Commonwealth*, 100 Pa. 222, 232. “A Constitution is not to receive a technical construction, like a common-law instrument, or statute.”—*Dorman v. State*, 34 Ala. 216, 235. Here the Constitution has descended to legislative detail, it may be said; but, if this provision for a form were found in a statute, it would be held that a literal compliance should not be exacted.—*Scott v. Simons*, 70 Ala. 352, in which case the court was dealing with the imperative language of the original act of 1873 fixing a form for the separate acknowledgement

[*Realty Investment Co. v. City of Mobile.*]

of a wife in a conveyance of the homestead. As afterwards codified, the language of the act was made to conform to that of the decision. The application of this principle of substantial conformity to statutory regulations of the manner of holding elections is common.—Payne on Elections, § 498. And in *State v. Nicholson*, 102 N. C. 465, 9 S. E. 545, 11 Am. St. Rep. 767, it was applied in a case where the oath administered for registration to a large number of voters omitted words which were prescribed in the imperative language of a constitutional provision; the court saying: "In substance and legal effect the constitutional requirement is fully met in the oath as taken." And so, while the provision under consideration is mandatory in the sense that it places a duty upon officers charged with the preparation of the ballot in respect to its form which they will not be permitted to deny or evade, yet we think the purpose and requirement of the Constitution will be satisfied with a substantial compliance. To hold otherwise would subordinate substance to form, the end to the means, and this, we think, the framers of the Constitution did not intend.

The substance of the constitutional mandate is that the ballot shall contain both an affirmative and a negative statement of the proposition for an issue of bonds, and that a statement of the character of the bonds shall be embodied in each alternative. It was left to the Legislature to provide regulations for elections generally which would secure a free and fair exercise of the elective franchise. In the matter of elections for bond issues the more definite purpose of this isolated provision seems to have been to provide security for intelligence of choice and its easy expression. These constitute the substance of things for the security of which the form was provided. In our opinion those purposes

[*Realty Investment Co. v. City of Mobile.*]

were duly safeguarded and the form provided by the Constitution substantially followed in the ballot in the instant case. It was so arranged as to set forth very clearly the issue in two forms, viz., "For proposed bond issue of \$100,000 bonds of the city of Mobile to be sold for the purpose of extending its sanitary sewer system," etc., and, "Against proposed bond issue of \$100,000 bonds of the city of Mobile to be sold for the purpose of extending its sanitary system," etc. The use of the printer's brace was such as to make one statement of the character of the bonds serve for both the affirmative and the negative of the question submitted to the voter, whereas an exacting pursuit of the constitutional form would have required that the statement be literally repeated. To the eye and the understanding, however, the statement as to the character of the bonds is made, first in connection with "For," and is then repeated in connection with "Against." In our judgment there was in the preparation of the ballot a substantial compliance with the form provided by the Constitution, and the result of the election should not be overturned.

It may be said that our conclusion cannot be reconciled with that reached in the case of *Coleman v. Town of Eutaw*, 157 Ala. 327, 47 South. 703. We concede that expressions are to be found in the course of the argument of the opinion in that case which, if followed to their logical conclusion, would lead to a result different from that we have indicated as proper in this. But the learned chancellor who tried both that case and this was of the opinion that the ballots used on the two occasions were materially different, and that the opinion of this court in that case, when read in the light of the facts there shown, did not conclude the case at bar. In that opinion of the chancellor we agree. In that case the statement of the character of the bonds

[*Realty Investment Co. v. City of Mobile.*]

voted upon was not embodied in a sentence with the words "For bond issue" and "Against bond issue," but was made separately and at a different place on the ballot. We do not doubt that that case was properly decided on its facts. As for expressions used or opinions stated *arguendo*, they are not within the principle of *stare decisis*, and we do not feel that we are necessarily bound to follow or to overrule them. The authority of adjudged cases is confined to the points actually decided, and the true principles of the decision. "In every court, if a case varies from the facts and circumstances of preceding authorities, the judge is at liberty to found a new decision on these circumstances"—(Lord Eldon, 8 Dow. 112), and it has never been asserted that everything said in the argument of legal questions is to be regarded with the deference due alone to the true principles on which the decision should rest—(*Rawls v. Kennedy*, 23 Ala. 252, 48 Am. Dec. 289).

Let the decree be affirmed.

Affirmed.

DOWDELL, C. J., and MAYFIELD, SOMERVILLE, and DE GRAFFENRIED, JJ., concur.

ANDERSON and McCLELLAN, JJ., dissenting.

McCLELLAN, J.—(dissenting.)—The concrete question presented by this appeal is: Was the ballot used in the election of September 2, 1912—to determine whether the city of Mobile should issue \$100,000 of 5 per cent. 30-year bonds, for the purpose of extending the sanitary sewer system of that city—such a non-observance of the form of ballot prescribed by section 222 of the Constitution of 1901 (and by the statute, Code, § 1423, which copies section 222 in respect of the form of the ballot) as to render void the issue of bonds of the city for the purpose stated?

[Realty Investment Co. v. City of Mobile.]

This inquiry may be more pointedly illustrated than stated, after quoting section 222 in the particular here important. In that respect said section reads: "The ballot used at such election shall contain the words, 'For.....bonds issue,' and 'Against.....bond issue' (the character of the bonds to be shown in the blank space), and the voter shall indicate his choice by placing a cross mark before or after the one or the other."

In the present instance, if the form of ballot prescribed in section 222 had been pursued, the ballot would have contained this:

"For \$100,000.00, 5 per cent., 30-year, sanitary sewer extension bond issue.

"Against \$100,000.00, 5 per cent., 30-year, sanitary sewer extension bond issue."

According to the interpretation taken by this court of the quoted provision of section 222 in *Coleman v. Town of Eutaw*, 157 Ala. 327, 47 South. 703, the form of the ballot employed in this instance was not an observance of the form mandatorily prescribed in that section, and hence the attempted issue of bonds was void. Reference to that deliverance in interpretation of section 222 will disclose that the court has now fallen into the same error for which the decree was reversed in *Coleman v. Eutaw*.

One of the most highly respected text-writers on constitutional law has set down in his work these obvious truths: That to ignore in legal administration is to affirmatively invite consequences of far greater harmful effect than even the casting of an unsound conclusion in a concrete case between litigants at the bar. At pages 88 and 89, Cooley says: "A Constitution is not to be made to mean one thing at one time, and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in

[Realty Investment Co. v. City of Mobile.]

the case seem desirable. * * * What a court is to do, therefore, is *to declare the law as written*, leaving it to the people themselves to make such changes as new circumstances may require. The meaning of the Constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it."

The courts are not constituted censors to determine the wisdom of constitutional ordainments; and if such a function is assumed, even inadvertently, by the judiciary, the inevitable end is the destruction of written Constitutions. Such instruments are the supreme law, binding all departments of the governments; and if the judiciary should assume the function of passing upon the wisdom or propriety of the Constitution's plain provision, it would violate—not preserve—the charter of its existence; would leave its established governmental orbit.

"The framers of the Constitution must be understood to have employed words in their natural sense, and to have intended what they said. * * * We can only learn what they intended, from what they have said. It is theirs to command; ours to obey. *When their language is plain, no discretion is left to us.*" (Italics supplied.)—*Lehman v. Robinson*, 59 Ala. 219, 241; *Ex parte Mayor, etc.*, 78 Ala. 419, 423; *State ex rel. v. McGough*, 118 Ala. 159, 166-7, 24 South. 395.

In *State ex rel. v. McGough*, *supra*, it is aptly declared: "Whenever a constitutional provision is plain and unambiguous, when no two meanings can be placed on the words employed, *it is mandatory, and the courts are bound to obey it.* * * * What it ordains must stand as its own unquestioned arbitrary authority in the government of the state. In such a case, as has been said, there is no room for construction, and certainly

[*Realty Investment Co. v. City of Mobile.*]

none for disobedience by the courts. If so, there would remain no certainty or stableness in the written Constitutions of the states, or federal government.”—(Italics supplied.)

Following the obviously sound pronouncements in *Tuskaloosa Bridge Co. v. Olmstead*, 41 Ala. 9, *Weaver v. Lapsley*, 43 Ala. 224, and *Perry County v. Railroad*, 58 Ala. 556, in which Cooley’s pertinent language was adopted, it was ruled in *Coleman v. Town of Eutaw*, 157 Ala. 327, 47 South. 703, that the prescription for the form of the ballot specified in section 222 was *mandatory*; and that a failure or refusal to observe that form—the observance of which is made an unavoidable condition precedent, by way of mandatory prohibition, to the valid issuance of bonds—would render wholly void any issue of bonds based thereupon. It was there said: “We can deduce from our adjudications mentioned and from the authorities on which they are rested no other rule than that provisions of the organic law, defining a particular mode in which a power is to be exercised, must be taken as limitations against and restrictions upon the observance of any other mode than that prescribed in the organic law, and that a mode attempted other than that particularly defined can work nothing but a nullity.”

Besides the form prescribed for bond-issue ballots in section 222, our Constitution contains two other prescriptions of that mandatory nature. One of them, set forth in section 170, prescribes that the style of processes shall be “the state of Alabama,” and that all prosecutions shall conclude “against the peace and dignity of the state.” The other prescription of that nature, set forth in section 285, is with respect to *form* of ballot for election on proposed amendments to the Constitution. It is therein mandatorily provided:

[Realty Investment Co. v. City of Mobile.]

"Following each proposed amendment on the ballot shall be printed the word 'Yes' and immediately under that shall be printed the word 'No.' The choice of the elector shall be indicated by a cross mark made by him or under his direction, opposite the word expressing his desire. * * *" The statute (Code, § 390) wisely follows the exact requirement, in this particular, of the just-quoted provision of the Constitution. So, too, does the statute (Code, § 7131) wisely conform to the Constitution's requirement, in the indicated particular, in section 170. It may be here pertinently observed that even the Legislature has not assumed to take such liberties with these mandatory prescriptions as was done in the formation of the bond-issue ballot now under view. If that co-ordinate branch of the government had so assumed, could it be for a moment doubted that such a departure from the mandatory prescription of the organic law would, when the question was presented, be declared void by this court?

In the appeal of *Smith v. State*, 139 Ala. 115, 36 South. 727, the indictment did *not* conclude "against the peace and dignity of the state." This court said: "The indictment charges the offense denounced by section 4757 of the Code, but does not conclude 'against the peace and dignity of the state,' as is required by section 4893 of the Code and section 170 of article 6 of the Constitution. *It is therefore insufficient to support a conviction* and should have been quashed." (*Italics supplied.*) The defendant was discharged. The indictment, by its clear terms, fully advised the accused of the "nature and cause of the accusation" against him. Such is a first and an ultimate purpose of the exaction of a written accusation. But this court, in *Smith's Appeal*, did not think that the effect of non-observance of that mandatory constitutional provision

[*Realty Investment Co. v. City of Mobile.*]

could be avoided by reason of the obvious fact that the accused was, notwithstanding the omission of the words the Constitution specifies, fully advised of the nature and cause of the accusation against him. The Constitution's mandate was enforced *as written*, thereby observing the clear judicial duty "to declare the law as written." Certainly, there is no power reposed in this court to weigh the relative necessity or ultimate wisdom of constitutional mandates, by reference to the subjects thereof, and to conclude through that process the relative imperativeness of such mandates. Being without that power, it is impossible that a discrimination may be soundly made between the nonobservance of such a mandate in the drafting of an indictment and the non-observance of a prescribed *form* for the ballot in bond-issue elections, or in elections upon proposed amendments to the Constitution. If the decision in *Washington v. State*, 53 Ala. 29, may be said to express a different view of the constitutional mandate from that pronounced in *Smith's Appeal*—in that there the indictment concluded "against the peace and dignity of the *state of Alabama*" instead of "against the peace and dignity of the same," as the organic law then prescribed—it is evident that the departure from the command of the organic law was one where for the specified word of reference, viz., *same*, the indictment employed the very subject of that word of reference, viz., *the state of Alabama*; and, in addition, thereby exactly followed the code-made form in that particular, as the court there ruled. In *Atwell v. State*, 63 Ala. 61, the conclusion of the indictment—returned in March, 1876, after the Constitution of 1875 went into effect December 6, 1875—employed the identical words prescribed in that instrument. It is obvious that neither of these decisions sanctions a view opposed to that prevailing

[*Realty Investment Co. v. City of Mobile.*]

in *Smith v. State, supra*. It is equally clear that they cannot be taken to justify the substitution, by the Legislature, subordinate officers, or other agencies, of an entirely different form or matter from that the organic law prescribes, as is illustrated by the ballot form with which this appeal is concerned.

With respect to the elements of the form prescribed in section 222, reference to *Coleman v. Eutaw* will suffice without repetition here.

As employed in section 222, *character* is not the synonym of the word *description*; and its use there is figurative. In requirement, it imports the *quality* of the thing, and not its portraiture, which, if its *description* was exacted, would comprehend the detailed account of its every feature. Its import is general, not particular. To insist that character means description—a contention not at all justified—and that to describe the proposed issue in the blank spaces would offend the grammarian's sense of order and propriety, is but, only, an argument against the good sense of the adoption of the *form* mandatorily prescribed. Its only proper place of delivery and of consideration was in the convention writing our organic law. Given an unambiguous meaning in the Constitution, as is patent in this instance, the sole function of the court is, as Cooley expresses and emphasizes it, "to declare the law as written." "It is theirs to command; ours to obey."—*State ex rel. v. McGough*, 118 Ala. 166, 24 South. 395. It is not even pretended that the form of ballot prescribed by section 222 is impossible of practical use, for such a pretense would reflect upon the intelligence of the pretender; and that self-criticism is not to be anticipated, much less actually encountered.

It appears at once that the ballot used in this instance did not conform, as it should have done, to the *form*

[Realty Investment Co. v. City of Mobile.]

prescribed in the Constitution. That is too plain to admit of doubt. If that were otherwise debatable, all doubt is removed by the chief, and really only, contention to sustain this bond issue, that the ballot form used represents a *substantial* compliance with the Constitution's object in prescribing a *form* for the ballot. There is no similarity in respect of *form*. In the *form* prescribed a voter is assured, by Constitution and statute, the privilege of indicating his choice "before or after the one or the other" of two completely stated propositions. The form here used denied the voter that right. A making of his mark on the right of this invented ballot would have expressed no choice whatever; and so, notwithstanding the imperative command of the Constitution that that particular means of expression of choice was of such consequence, in the estimation of the Constitution makers, as to invite its incorporation in so solemn an instrument. The employment of the *form* thus constitutionally prescribed being mandatory, it is the suggestion of an obvious fallacy to assert that any other form of ballot *which would fully advise the electorate of the matter submitted to his choice* may be as validly employed as would be that prescribed in the organic law. If the *form* of ballot prescribed is mandatory, as beyond any doubt it is, it is patent that this command of the Constitution operated, with perfect certainty, to deny to any other authority the right to consider or to determine that any other *form* than that prescribed would accomplish the Constitution's purpose. The fact that the Constitution mandatorily prescribes the *form* of ballot necessarily excludes the right or privilege of any person or authority to substitute his or its judgment on the subject for that of the organic law; to treat the prescription as a mere expression of preference for a particularly defined

[Realty Investment Co. v. City of Mobile.]

mode; to consider another method, ill-advisedly invented, to be wiser or better than that a constitutional convention wrote and the people of a great state approved at the ballot box. Constitutional mandates have not been so lightly regarded by this court in the past as to lead it to sanction the substitution of any judgment, even that of the Legislature, for that the Constitution clearly expressed; for it has been always accepted here that that inquiry was wholly foreclosed when the organic law expressed a clear purpose, an unambiguous intent; and so, even in cases where *method* was the Constitution's prescription. In this connection, the pertinent, in principle, pronouncement of this court in *Collier v. Frierson*, 24 Ala. 109, may be repeated. There the question was whether the amendment of the Constitution had been validly effected; whether the mode prescribed by the organic law for its amendment had been pursued. It was there said, Justice Goldthwaite writing: "The Constitution can be amended in but two ways; either by the people, who originally framed it, or in the mode prescribed by the instrument itself. * * * We entertain no doubt that, to change the Constitution in any other mode than by a convention, every requisition which is demanded by the instrument itself must be observed, and the omission of any one is fatal to the amendment. We scarcely deem any argument necessary to enforce this proposition. The Constitution is the supreme and paramount law. The mode by which amendments are to be made under it is clearly defined. It has been said that certain acts are to be done—certain requisitions are to be observed—before a change can be effected. But to what purpose are these acts required, or these requisitions enjoined, if the Legislature or any other department of the government can dispense with them. To do so would be to

[*Realty Investment Co. v. City of Mobile.*]

violate the instrument which they are sworn to support; and every principle of public law and sound constitutional policy requires the courts to pronounce against every amendment, which is shown not to have been made in accordance with the rules prescribed by the fundamental law."

In *Tuskaloosa Bridge Co. v. Olmstead*, 41 Ala. 9, 19, the familiar constitutional provision with respect to the amendment or revision of laws by the Legislature was under consideration. In that connection it was said; Justice A. J. WALKER writing: "We have given careful attention to the argument that the clause of the Constitution under consideration is a mere rule of legislative proceeding, and does not render void a law not conformable to it. An anxious desire to allow effect to the will of the Legislature, and to avoid a seemingly harsh visitation of a rule, the usefulness of which is hardly proportionate to its inconvenience, induced us to prolong our advisement on the case, with the hope of discovering reason or authority which would lead us to the support of that argument. But it still seems to us that the clause raises a question of legislative power, and is not a mere rule for the government of the General Assembly in its proceedings. The prohibition is emphatic that no law shall be revised or amended, except in the mode specified. This is a command, not specially, or professedly, addressed to the Legislature alone. It is as general and comprehensive as any prohibition in the Constitution. It is binding upon the executive, who approves or disapproves bills, and upon the judiciary, who declare the law, as well as upon the Legislature. What warrant can there be, then, for the position that it is simply a rule for the guidance of the Legislature? When the Constitution says no law shall be amended, save in a special manner, can the Legisla-

[*Realty Investment Co. v. City of Mobile.*]

ture say a law may be and shall be amended in a different manner? The case is, to our minds, a plain one of irreconcilable conflict between the paramount law of the Constitution and the enactment of the Legislature. When such a conflict is clearly presented to the judicial mind, the Constitution must prevail."

In *Perry County v. Railroad Co.*, 58 Ala. 556, Justice STONE, writing for the court, thus pronounced: "We think the only safe rule for interpreting clauses of the Constitution which command certain things to be done, or certain methods to be observed in the enactment of statutes, is to hold that, when it is affirmatively shown by legal evidence that in the attempt to legislate some mandate of the Constitution has been disregarded, such attempt never becomes a law." Surely, in the light of these adjudications and of many others, delivered by this court, to like effect, it cannot be soundly assumed, without violating plain constitutional commands, that a discretion is lodged anywhere to exercise a power in a different way from that the fundamental law prescribes that power shall be exercised. If such a discretion exists, then the provision of the organic law is not mandatory—an affirmation of status that cannot be justified with respect to the *form* of the ballot prescribed in section 222. Under a long and unbroken line of authority here, to say nothing of the reason of the thing, it would seem to be a complete, irrefutable demonstration of the necessity for, and the importance and imperativeness of, the *form* of ballot prescribed that *it is* prescribed in the Constitution. Nevertheless, the proceedings of the convention writing this Constitution and of its standing committee on "order, consistency, and harmony of the whole Constitution," accord with and emphasize, if that is possible, the particular, specific, plainly expressed constitutional intent

[*Realty Investment Co. v. City of Mobile.*]

to exclude any discretion anywhere with respect to the form of the ballot in the submission of a choice to the electorate in bond-issue elections.

What is now, in the presently important particular, section 222, was section 3 of the article entitled "Municipal Corporations."—*Journal, Const. Convention*, p. 1317. It was adopted, along with other pertinent sections on the seventy-first day of the convention.—*Journal*, p. 1316. There was, in section 3 as then adopted, no form of ballot prescribed. So far as we are now concerned, section 3 read: "No county, city, town, village, district or other political subdivision of a county shall have authority or be authorized by the General Assembly, after the ratification of this Constitution, to issue bonds, unless such issue of bonds shall have first been approved by a majority vote by ballot of the qualified voters of such county, city, town, village, district or other political subdivision of a county, voting upon such proposition. *In determining the result of any election held for this purpose no vote shall be counted as an affirmative vote which does not show on its face that such vote was cast in approval of such issue of bonds.*"—*Journal*, p. 1317. (*Italics supplied.*) The proposed instrument was referred to the committee on order, consistency, and harmony of the whole Constitution; and on the seventy-eighth day of the convention the report of that committee was taken up.—*Journal*, p. 1484. In the report of this committee, shown on *Journal*, p. 1491, referring to the article on Municipal Corporations, it is related: "(1) The first part of section 3 was rewritten, as will appear in section 222 of the Constitution herewith reported." The rewriting of section 3, as section 222, resulted in the substitution of the provision for *form* of ballot and method of expression of the voter's choice in bond-issue elections, for

[Realty Investment Co. v. City of Mobile.]

these words, italicized in the before-quoted section 3: "In determining the result of any election held for this purpose no vote shall be counted as an affirmative vote which does not show on its face that such vote was cast in approval of such issue of bonds."

The intention thus plainly evinced by the committee on order, consistency, and harmony of the whole Constitution, and appropriated and approved by the adoption by the convention of that committee's report in this particular, was to conclude, finally and fully, against any possibility of uncertainty of the voter's "affirmative vote * * * in approval of such issue of bonds" by prescribing a particular, plain *form* for taking the choice of the electorate, both in respect of the subject of that choice and of the method, particularly defined, whereby the voter shall express that choice, viz., "by placing a cross mark before or after the one or the other" of two thus simply, clearly submitted propositions for his choice. In the light of the considerations adverted to, the conclusion is unescapable that the insistence, that the ballot under consideration represents a substantial compliance with the constitutional mandate, resolves itself into this, and this only: That the *form* of ballot employed in the present instance—patently not the *form* the Constitution prescribes—served as well the constitutional purpose in ordaining the *form* set forth in section 222 as would or does the *form* the fundamental law prescribes in that section. . If it were so affirmed, it is too plain for cavil that the process thus sanctioned would be a violation of the command of the organic law; would express a pure assumption of right to observe another method in a case where the organic law had prescribed a particular method; would admit a discretion against which the fundamental law had concluded in unmistakable terms; would

[*Realty Investment Co. v. City of Mobile.*]

annul a constitutional mandate by giving it, at most, a merely directory effect and operation; would invite uncertainty in respect of clear statement, on the ballot in such elections, and of the expression of the popular will in the premises, by allowing such varied *forms* as numerous municipal and county authorities in the state might see fit to invent, thus injecting into such methods an inquiry—impossible if the constitutional mandate is observed—whether the *forms* variously invented fully advised the electorate of the subject of choice and sufficiently afforded the means for an expression of choice thereupon, and this, notwithstanding the organic law has mandatorily defined the best and only (in its competently arbitrary and conclusive judgment) method and means whereby the subject of the choice may be submitted and the means of the expression of choice may be afforded.

The contention for substantial compliance in the present instance amounts to this: The *form* of ballot invented for this bond-issue election served all the purposes that inspired the mandatory prescription of the particular *form* of ballot in section 222; and, having contrived a *form* of ballot—though different in *form* from that prescribed in section 222—which meets all the requirements of the constitutional *purpose* (not *form*, in its ballot form, there is a substantial compliance, and bonds may validly issue thereupon. If there was no *form* prescribed, this contention would have merit; but since there is such a prescription of *form* in the organic law, and that mandatory, the contention refutes itself. It cannot be that a substantial compliance with a *purpose* or object entertained is a substantial compliance with an exclusively prescribed method and means to effectuate that purpose or object. If this were not true, then our books abound with state-

[Realty Investment Co. v. City of Mobile.]

ment and illustrations of fundamental error; for this court has taken the prescriptions of Constitutions with respect to methods as excluding the observance of invention of any other method, the organic law being always accepted where it commands, as furnishing the final, irrevisable rule, since "what it ordains must stand as its own unquestioned arbitrary authority in the government of the state."

These considerations compel, it seems to me, the conclusion that the ballot form used in this instance did not conform to that the organic law mandatorially prescribes; and that no valid bond issue could be based thereupon. Since no power of discretion, review, or revision, with respect to the wisdom or necessity of plain, unambiguous provisions of the Constitution, is reposed anywhere, I feel bound to uphold and enforce such provisions of the fundamental law *as they are written*. As I read the books, such has been the unvarying practice and intent of this court in the performance of the grave duty imposed upon it.

In my opinion the decree should be reversed and the cause remanded.

Since the foregoing opinion was written, the views entertained by the majority of the court have been reduced to writing. Reference to the authorities cited therein will, in my opinion, show that they are not entitled to the influence given them by the majority on the question under view.

The case of *Beawfage*, 10 Coke, 100, and the case of *Smith v. Allen*, 1 N. J. Eq. 43, 21 Am. Dec. 33, involved the effect of a nonobservance of *statutory* provisions with respect to taking certain kinds of bonds—assurances against conduct or to pay money. The decision in the *Beawfage Case* is fully stated in *Claasen v. Shaw*, 5 Watts (Pa.) 468, 30 Am. Dec. 338. The former was

[*Realty Investment Co. v. City of Mobile.*]

followed in *Smith v. Allen*, *supra*. Of course, in neither of them was a *mandatory* constitutional prescription a factor.

If a question of *construction* was here presented, the language quoted from *Houseman v. Commonwealth*, 100 Pa. 222, 232, and *Dorman v. State*, 34 Ala. 216, 238, would be apt; but, since the mandatory prescription as to *form* of ballot, in section 222, is plain and unambiguous, "no room is left for construction."—*Ex parte Mayor, etc.*, 78 Ala. 423; *State v. McGough*, 118 Ala. 166-7, 24 South. 395; Cooley's Const. Lim. 68. The sole question here is: Has the imperative constitutional command been obeyed?

State v. Nicholson, 102 N. C. 465, 9 S. E. 545, 11 Am. St. Rep. 767, deals with the qualification of electors, with respect to the oath taken by them for registration. There the court found and adjudged that the oath administered to the voter was the legal equivalent of the particular oath prescribed in the organic law of that state. It was also said by the court that the oath taken was that "prescribed by the statute in the very words," but that it omitted the express obligation to support the laws of the United States and of North Carolina not inconsistent therewith. As appears from the quotation to be made, the ruling was sustained by the forced and peculiar conclusion that "an obligation and promise made" to "support and maintain" the respective Constitutions "extends to, and embraces all, legislative action which is authorized by, and made pursuant to, them, and the violation of a valid enactment is a violation of the Constitution that imparts its sanction to the enactment." Constitutions are as distinct from enactments as is the *parent* from the *child*. The court, however, was not satisfied to rest its conclusion upon that promise alone, for it was thought necessary to

[*Realty Investment Co. v. City of Mobile.*]

add: "Aside from these considerations, we are of the opinion that a disregard of those directions found in the law, *fundamental* or *statutory* (except as to the time and place of holding the election), relating to the manner of conducting it, designated as irregularities, not affecting the result as a fair expression of the popular will, does not warrant a rejection of the vote given at a polling place. *The same principle must govern the registering of electors.*" (Italics supplied.)

Manifestly, the court saw and recognized that the only way in which to justify the departure from the employment of the *constitutional oath* was to hold, as was done, that constitutional provisions, including the prescription of the oath ("except as to the time and place of holding the election"), were *directory*, not *mandatory*. The last-quoted expression of the court readily accounts for the previous assertion that the obligation and promise to support and maintain the Constitution comprehended an assumed obligation and promise to support and maintain the laws of the United States and of North Carolina not inconsistent therewith. It need hardly be added, in this connection, that *State v. Nicholson* does not deserve to be followed as authority in preference to these well-considered, opposing adjudications of this court: *Smith v. State*, 139 Ala. 115, 36 South. 727; *Tuskaloosa Bridge Co. v. Olmstead*, 41 Ala. 9; *Weaver v. Lapsley*, 43 Ala. 224; *Perry County v. Railroad*, 58 Ala. 556; *Collier v. Frierson*, 24 Ala. 109; *State v. McGough*, 118 Ala. 159, 166, 167, 24 South. 395.

Even in cases where the prescription for a particular form of oath was *statutory only* (thus, of course, eliminating the major factor of constitutional command), and the oath taken was materially different from that prescribed, *State v. Nicholson* will, upon investigation,

[*Realty Investment Co. v. City of Mobile.*]

be shown to be out of harmony with the principle applied in many of the best-considered cases in other jurisdictions. See *Perry v. Thompson*, 16 N. J. Law, 72; *Shattuck v. Bascom*, 105 N. Y. 39, 44-6, 12 N. E. 283; *Merritt v. Portchester*, 71 N. Y. 309, 27 Am. Rep. 47; 29 Cyc. pp. 1304, 1305; and others cited in them.

Scott v. Simons, 70 Ala. 352, is the remaining case cited in the major question presented. That decision, even from the premise of a statute, supports the proposition I have before written, viz., that an authoritative, mandatory prescription of a mode for the exercise of a power "must be regarded as a negative on all other modes * * *"—*Scott v. Simons, supra*.

And in other cases of the class to which *Scott v. Simons* belongs—dealing with a *statutory* form of acknowledgement—far less departures from that form than appears to have been attempted in the ballot form under view from that the organic law mandatorily prescribes justified this court in pronouncing the acknowledgement invalid and the conveyance ineffectual.—*Strauss v. Harrison*, 79 Ala. 324; *Motes v. Carter*, 73 Ala. 553; *Daniels v. Lowery*, 92 Ala. 519, 8 South. 352; 2 Mayf. Dig. p. 1068 et seq.; 5 Mayf. Dig. p. 9. Since the constitutional prescription is with respect to *form*, and that *form* was wholly unobserved, I can see no basis whatever for an appeal to authorities treating substantial compliance with statutory or other *forms*.

ANDERSON, J., concurs in the foregoing dissenting opinion.

[Dixie Grain Co., et al. v. Quinn.]

Dixie Grain Co., et al. v. Quinn.

Bill to Restrain Turpentine Operation and to Redeem Land.

(Decided February 6, 1913. Rehearing denied April 23, 1913.
61 South. 886.)

1. *Equity; Demurrer; Effect.*—On demurrer the allegations of the bill must be taken as true.

2. *Same; Relief.*—Equity will not use its powers to accomplish a useless purpose.

3. *Same; General Prayer; Mortgages.*—Although the special prayer of the bill was for redemption from mortgage foreclosure and reconveyance to the mortgagor, yet where its general purpose was to relieve complainant from the cloud upon title cast by the deed executed upon foreclosure, relief by cancelling such deed as a cloud on complainant's title could be granted under the general prayer for relief, as the allegations showing the invalidity of such deed, coupled with the general prayer for relief, were sufficient to warn respondent of such ultimate relief.

4. *Same; Multifariousness.*—A bill by the owner of land to redeem from a timber mortgage and to cancel a conveyance of the timber by a purchaser at sheriff's sale, brought against such purchaser and its grantee, as well as to enjoin the grantee from maintaining a turpentine orchard in the timber, was not multifarious as to the joinder of respondents and the relief prayed.

5. *Equity; Pleading; Demurrer.*—Although a bill may be demurrable as to a part of the relief sought against one respondent, such defect is not reached by a demurrer addressed to the bill as a whole, and hence, such demurrer was properly overruled.

6. *Same; Questions Raised.*—Whether the purchaser of property then covered by a mortgage containing a power of sale, made due inquiry as to whether the power had been executed, is a matter of defense, and cannot be raised by demurrer.

7. *Quieting Title; Relief.*—Where the bill authorized the cancellation of a deed as a cloud upon title as against the grantee in the deed, the same relief will be authorized as against all deriving their claim of title from such deed.

8. *Mortgages; Recording; Notice of Power of Sale.*—The recording of a mortgage containing a power of sale operates as notice to the world of such power, and of any title acquired by a purchaser thereunder, and hence, would deprive subsequent judgment creditors and purchasers of the protection of the registration statute, though they had no actual knowledge of the foreclosure and sale under the power, although the foreclosure deed was not recorded prior to the rendition of their judgment.

[Dixie Grain Co., et al. v. Quinn.]

9. *Same; Foreclosure; Property Conveyed.*—One who received a sheriff's deed to standing timber merely cannot convey the right to operate a turpentine orchard in connection with such timber, the purchaser's right to convey including only the right to remove it.

10. *Same; Redemption; Duty Recorded.*—In a suit to redeem land from a mortgage foreclosure sale, an allegation that the mortgage was duly recorded, without alleging the date, was sufficient, since the word, "duly" as used in connection with "recorded" meant that it was recorded within the time allowed by law.

11. *Vendor and Purchaser; Bona Fide Purchaser; Recording Mortgage; Notice of Sale.*—The rule that the recording of a mortgage containing a power of sale is notice to the world of a sale under the power does not conclusively charge subsequent purchasers with knowledge, unless such purchaser failed to make the proper inquiry, in which case the presumption of notice is conclusive.

12. *Conjunction; Trespassers; Completed Trespass.*—Where the injury to land by cutting and boxing trees for turpentine has already been done, mere recurrent trespasses in operating the business will not authorize the injunction of such trespassing, in the absence of a showing that the respondent or the trespasser is insolvent.

APPEAL from Choctaw Chancery Court.

Heard before Hon. THOMAS H. SMITH.

Bill by Ellen Quinn against the Dixie Grain Company and others for injunction to restrain the maintenance of a turpentine orchard upon certain lands, and to redeem. Decree for complainant, and respondents appeal. Affirmed.

The bill of complaint shows the following material facts: The complainant was and is owner and in possession of certain land, known as the Quinn plantation, on the Bigbee river. On January 2, 1900, she conveyed (?) to R. H. Vidner the stumpage of pine trees on said land, the transaction with him being evidenced by a writing in these words "Received of R. H. Vidner \$615 for the stumpage of pine timber, to cut not under eight inches off the lands at the Quinn plantation on the Bigbee river (but the trees at or near the dwelling are not to be cut). Said Vidner has the right of way to haul the logs off the land to the river. This sale is to cover the stumpage on all of Mrs. Quinn's land at this location." This paper was signed by Mrs. Quinn and wit-

[Dixie Grain Co., et al. v. Quinn.]

nessed. Said Vidner having died, his administrator conveyed his said timber rights and privileges to the Powe Logging Company in August, 1902. In January, 1905, G. W. Powe, who was in fact the Powe Logging Company, mortgaged his interest in said timber to the Alabama Lumber Company, the mortgage being duly recorded, and after the law day said mortgagee foreclosed the mortgage pursuant to the conditions therein and itself purchased at the sale. In October, 1906, said Alabama Lumber Company conveyed to Berry & Sons, a partnership, and in November, 1909, Berry & Sons individually conveyed to complainant their rights in said timber. In the meantime, in March, 1908, before the deed to Berry & Sons was recorded, there was a sheriff's sale of the standing pine timber on the Quinn plantation under execution on a judgment against the Powe Logging Company, George W. and M. P. Powe, at which the Dixie Grain Company, one of respondents, became the purchaser for \$25. It was alleged that when said execution was levied on the interest sold none of said defendants in execution had any interest in the timber described in said sheriff's deed; they having previously conveyed the same as hereinbefore set out. The bill alleges, on information and belief, that the respondent Williams bought of said Dixie Grain Company certain turpentine privileges on said Quinn land, and, claiming the right to maintain a turpentine orchard thereon, has entered and boxed all available timber for that purpose. In February, 1910, complainant offered to redeem the Vidner timber rights from the Dixie Grain Company, as purchaser at said execution sale. She has also notified said Williams not to trespass on said lands, but he still claims the right to operate a turpentine orchard thereon, and continues to trespass, and to box and otherwise damage all the timber availa-

[Dixie Grain Co., et al. v. Quinn.]

ble for turpentine purposes. Thirty dollars was paid into court for redemption, with offer to pay whatever is necessary or found due to redeem from the Dixie Grain Company. The bill denies any right of turpentine privileges on said lands in the Dixie Grain Company, and any right to convey such privileges to respondent Williams. The prayer is to enjoin said Williams from further maintaining the turpentine orchard on the land, from boxing the trees thereon, or entering upon said land, for the purpose of carrying on a turpentine or rosin business; that it be decreed that she has a right to redeem the timber herein described from sheriff's sale to the Dixie Grain Company, upon payment of the amount found due; and that the said Dixie Grain Company be required to deed to oratrix all the right, title, and interest acquired to said timber under said sheriff's sale, and to annul and avoid the conveyance made by the Dixie Grain Company to Williams, and for general relief. Respondent separately interposed demurrers which went to the bill as a whole, and on this ground were held not well taken and were overruled, and from this decree the appeal is taken.

RICH & HAMILTON, for appellant. Complainants are not entitled to redeem, as the rights of debtor and purchaser at execution were fixed at the date of such sale.—*Henderson v. Prestwood*, 116 Ala. 464; 24 Cyc. 68. Section 3505, Code 1896, does control as the Code of 1907, did not go into effect until after the sale, and it has always been the rule in this state that the statutory right of redemption is a non-assignable personal privilege, and the vendee as used in the statute is the vendee before sale and not after.—*Wallace v. Markstein*, 147 Ala. 262; *Chambers v. Pollak*, 143 Ala. 438; *Henderson v. Prestwood*, *supra*. The bill must show that

[Dixie Grain Co., et al. v. Quinn.]

the complainant is certainly in one of the classes entitled to redeem.—*Henderson v. Hambrick*, 129 Ala. 596. No delivery of possession is alleged.—*Nelms v. Remson*, 89 Ala. 329; *Hanna v. State*, 84 Ala. 305; *Henderson v. Hambrick*, *supra*; *L. & N. v. Massey*, 136 Ala. 156. The bill is multifarious.—*Bentley v. Barnes*, 155 Ala. 659; *Amer. R. Co. v. Linn*, 93 Ala. 610; *Sims*. Ch. Pr. sec. 233. A grantor without covenants has no interest in the litigation, and is, therefore, not a proper party.—*Lewis v. Elrod*, 38 Ala. 17; *Meritt v. Phoenix*, 48 Ala. 67; *Thomas v. Jones*, 84 Ala. 303; *Mims v. Mims*, 35 Ala. 23; *Haley v. Bennet*, 5 Port. 452; *Staten v. Rising*, 103 Ala. 454.

GAILLARD & MAHORNER, for appellee. Demurrers were addressed to the whole bill, and were, therefore, properly overruled.—*Dickerson v. Winslow*, 97 Ala. 491; *Pate v. Henson*, 104 Ala. 599; *Burke v. Morris*, 121 Ala. 126; *George v. C. of Ga.*, 101 Ala. 607; *Inge v. DeMouy*, 122 Ala. 169. The bill presents grounds for equitable relief, as the complainant claims under a duly recorded mortgage with power of sale prior to appellant's judgment, and hence, appellant took subject to the mortgage.—*Jeffers v. Pease*, 52 Atl. 422. The bill contains equity as alleging facts entitling plaintiff to injunction.—*Snedicor v. Pope*, 143 Ala. 275; *Kellar v. Bullington*, 101 Ala. 271. The bill was not multifarious.—*Henry v. Carlton*, 113 Ala. 636; *Willis v. Neal*, 39 Ala. 464; 17 Enc. P. & P. 959; 27 Cyc. 1853. Complainant is within one of the classes entitled to redeem under section 3505, Code 1896.—*Robbins v. Brown*, 151 Ala. 236. The circumstances alleged avoid the necessity of alleging delivery of possession.—*Henderson v. Hambrick*, 129 Ala. 596.

[Dixie Grain Co., et al. v. Quinn.]

SOMERVILLE, J.—The material grounds of demurrer to the bill of complaint, so far as it is necessary to state them, are that it contains no equity; that it is multifarious; that its allegations are fatally self-repugnant; and that there is a misjoinder of parties defendant.

1. If the facts stated in the bill are true—and we so take them on demurrer—the respondent Dixie Grain Company did not acquire any interest in the timber by its purchase at sheriff's execution sale, because the defendants in execution had no interest in the timber which could thereby pass. The mortgage executed by them to the Alabama Lumber Company, having been duly recorded, was notice to the world, not only of the mortgage deed itself, but also of the power of sale therein contained, and equally of any title that may have been acquired by a purchaser at a sale made in execution of the power and in accordance with its terms. And although the deed of foreclosure was not recorded prior to the rendition of the judgment on which the sheriff's sale was founded, the notice resulting from the *recorded mortgage deed* was sufficient to deprive subsequent judgment creditors and purchasers of the protection of the registration statute.

The foreclosure purchaser's title is derived from the mortgage as its origin and source. It is but the stipulated result of the mortgagor's default, plainly forecast by the terms of his grant; and the purchaser's omission to record his deed does not preserve the equity of redemption in favor of those whose claims have originated subsequently to the registration of the mortgage itself, though they are specifically ignorant of an actual foreclosure.—Jones on Mortgages (6th Ed.) § 1897, pp. 851, 852; *Farrar v. Payne*, 73 Ill. 82; *Heaton v. Prather*, 84 Ill. 330. See, also, *Coles v. Allen*, 64 Ala. 98, 107.

[Dixie Grain Co., et al. v. Quinn.]

2. In this view of the case it is clear that, as equity does not lend its powers for the accomplishment of what is useless, the bill is without equity as to the Dixie Grain Company, unless the general prayer may authorize relief by way of canceling the sheriff's deed as a cloud on complainant's title.

The special prayer is for redemption and conveyance by the redeemtee to the redeмпtor. Relief under the general prayer by cancellation of the sheriff's deed would be in a narrow sense inconsistent with the theory of redemption, which concedes some validity to the purchaser's title.

But the clear purpose of the bill is to relieve complainant's land of the incubus of the sheriff's deed. Cancellation of that deed is as germane to that purpose as is redemption from it. And allegations which show its invalidity as against complainant, coupled with the general prayer for relief, are sufficient to warn respondent of such alternative relief, and to authorize the court to grant it.—*Rosenau v. Powell*, 173 Ala. 123, 55 South. 789. Nor would the actual insertion of such special prayer in the alternative render the bill multifarious.—Code, § 3095.

3. And if there is this equity in the bill as against the holder of the sheriff's deed it has the same equity against all derivative claims; for that relief must needs be very incomplete which, while striking down the parent, would yet spare its ill-begotten offspring.

Unquestionably Williams' claim is invalid as against complainant, not only because of his grantor's complete want of title, but because of that grantor's inability in any case to convey something which the sheriff's deed did not even pretend to carry; for certainly it is a far cry from cutting and removing timber to operating a turpentine orchard. We conclude, therefore, that in

[Dixie Grain Co., et al. v. Quinn.]

this aspect of the bill it contains equity as to each of the respondents.

4. The bill sufficiently shows a recurrent or continuous trespassing by Williams, productive of irreparable injury to the land, and not adequately redressible by legal remedies, in accordance with the rules stated in *Kellar v. Bullington*, 101 Ala. 267, 14 South. 466, *Nininger v. Norwood*, 72 Ala. 277, 47 Am. Rep. 412, and other cases, to support the prayer for injunctive relief against him. It is worthy of note, however, that where such relief is merely incidental to some other primary equity asserted by the bill the conditions to its granting are far less stringent.

5. While the prayer for redemption is by implication inconsistent with the allegations of the invalidity of the sheriff's deed, we discover no repugnancy in the allegations themselves.

6. It only remains to consider whether the joinder of these respondents and the relief sought against each of them render the bill multifarious. We are quite clear in our conclusion that it does not, so far as relief by cancellation is concerned. And, although the bill is demurrable as to the Dixie Company, *in so far as it seeks redemption*, a demurrer on that ground cannot be properly addressed to the entire bill.

7. It is not necessary to consider other grounds of demurrer going to the asserted right of redemption, since, whatever their intrinsic merit may be, they are addressed to the bill as a whole, and were, on that account at least, properly overruled.

The decree of the chancellor is affirmed.

Affirmed.

DOWDELL, C. J., and MCCLELLAN and SAYRE, JJ.,
concur.

[Dixie Grain Co., et al. v. Quinn.]

ON REHEARING.

The bill of complaint avers that the mortgage from G. W. Powe to the Alabama Lumber Company was *duly recorded*, without specifically averring *the date* of such record. It is insisted that this is not sufficient to show that it was recorded prior to the inception of the Dixie Grain Company's execution title. In January, 1906, when this mortgage was executed, the registration statute (section 1005, Code 1896) required that it be recorded within 30 days as against purchasers for value or judgment creditors without notice thereof; and the averment that it was *duly recorded* unquestionably means that it was seasonably recorded within the period allowed by law. The phrase is habitually used in this sense, and examples, casually noted, will be found in the opinions in *Steele v. Adams*, 21 Ala. 540, and *Miller v. Griffin*, 102 Ala. 613, 15 South. 238, in the headnotes to *Troy v. Smith*, 33 Ala. 469, and *Turner v. McFee*, 61 Ala. 468, and in the text of 2 Devlin on Deeds (3d Ed.) p. 1306. Certainly there is no better test of meaning than that of habitual use.

"Duly" means in due time or proper manner; in accordance with what is right, required, or suitable.—*Citizens' Bank v. Morse*, 60 Kan. 426, 57 Pac. 115: "Duly" in legal parlance, means "according to law."—*Brownell v. Town of Greenwich*, 114 N. Y. 518, 22 N. E. 24, 4 L. R. A. 685. See 14 Cyc. 1119 for numerous definitions.

It is true that, as used in the bill of complaint, the averment in question is but a conclusion of the pleader, and therefore, it may be subject to special demurrer. But in the absence of appropriate objection—and none was made—it must be held to sufficiently show a recordation of the mortgage within the time prescribed by law.

[Dixie Grain Co., et al. v. Quinn.]

A vigorous attack is made upon the doctrine that the record of a mortgage or deed of trust containing a power of sale is notice to subsequent purchasers of the execution of the power of sale, although the foreclosure deed is not recorded. The basis for the rule is to be found, of course, in the general principles underlying the law of notice, and their application to this particular case is neither novel nor unjust. The rule seems to have been stated and accepted as sound law by the leading text-writers on the subject.—Jones on Mortg. (6th Ed.) § 1897; 2 Devlin on Real Est. (3d Ed.) § 711; 24 Am. & Eng. Ency. Law, 85. Mr. Devlin says: "Where a trust deed or a mortgage with a power of sale is recorded, subsequent purchasers are compelled to inquire if any sale has been made under the power. If a sale has been made by virtue of the power, although the deed has not been recorded, a subsequent purchaser from the mortgagor does not acquire the estate. The equity of redemption is cut off by the sale."

So, also, the Supreme Court of the United States, in a case arising under the Illinois laws, has followed, without criticism and with apparent approval, the Illinois decisions on this subject.—*Mansfield v. Excelsior Refining Co.*, 135 U. S. 326, 10 Sup. Ct. 825, 34 L. Ed. 162.

Of course, this rule does not conclusively fasten upon subsequent purchasers from the mortgagor *knowledge* of the foreclosure of the mortgage and of a derivative title in some purchaser. It does, however, give him due and sufficient *notice* of these things, by which he is bound, on the assumption that reasonable inquiry of the mortgagee, or his known assignee, would elicit the facts. "Means of knowledge may be equivalent to knowledge. Whatever is sufficient to put one on his guard and call for inquiry is notice of everything to

[Dixie Grain Co., et al. v. Quinn.]

which the inquiry would lead.”—*Gamble v. B. W. Coal Co.*, 172 Ala. 669, 55 South. 190. And: “If the purchaser fails to make due inquiry, the presumption of notice is conclusive.”—2 Devlin on Deeds (3d Ed.) p. 1378, citing the authorities.

Appellant insists that the rule declared will work great hardship to innocent purchasers, and will embarrass the acquisition of safe titles wherever outstanding mortgages are apparent upon the records. The obvious answer is that one who in such a case does not make reasonable inquiries is not an innocent purchaser, and is entitled to no protection; and that one who does make such inquiries, in good faith and with due diligence under the circumstances, and is informed by both mortgagor and mortgagee, or their assigns, that the power of sale has not been exercised and the mortgage title remains in statu quo, and in good faith acts upon that information, is an innocent purchaser, and is entitled to protection against any unrecorded title derived from a foreclosure sale. To this hazard is the holder of such an unrecorded title always subjected if he fails to record it.

If appellant has in fact conformed to these requirements, this is a matter of defense to be presented by answer to the bill, and cannot be raised by demurrer.

With respect to the sufficiency of the averments of the bill to support the prayer for a permanent injunction against the respondent Williams, a re-examination of the bill shows that the injury to the freehold by cutting and boxing the timber for turpentine purposes is an already accomplished fact; and mere recurrent entries by Williams for the operation of that business, though trespasses, are not sufficient to authorize the writ of injunction, in the absence of an averment of his insolvency. The bill is therefore insufficient in this

[Clements, et al. v. Faulk & Co., et al.]

respect, and the original opinion will be modified accordingly.

However, the grounds of Williams' demurrer that point out this defect are addressed to the entire bill and were properly overruled, in view of the exhibition of another independent equity against him, viz., the right to a cancellation of the written deed or contract alleged to have been given him by the other respondent.

The application for rehearing will be overruled.

DOWDELL, C. J., and MCCLELLAN and SAYRE, JJ.,
concur.

Clements, et al. v. Faulk & Co., et al.

Bill for Partition.

(Decided February 13, 1913. 61 South. 264.)

1. *Partition; Rights of Surviving Wife and Children; Sale of Homestead.*—Under the provisions of section 4196, Code 1907, a court of equity could order a sale of lands, a reinvestment of the part of the proceeds belonging to the widow and minors, and a payment of the balance to the adult children, in a suit in which the widow and minor children all joined as complainants if convinced that it was to the interest of the minors for the sale to be had; especially in view of the further provision giving the chancery court power of sale for reinvestment with the consent of the widow in writing, this being intended to place the same limitations upon the power of courts to order a sale where the homestead vests absolutely as where by reason of solvency the homestead did not vest absolutely.

2. *Same; Who May Sue.*—A party having the present use and enjoyment of lands, and entitled to share in the proceeds of a sale as a remainderman may file a bill to sell such lands, if they cannot be equitably partitioned, although some of the parties interested therein may be remaindermen only.

3. *Appeal and Error; Disposition of Case; Judgment.*—Where the court denied relief because of the uncertainty as to his power to order a sale, and not because of a failure to prove the allegations of the bill, the appellate court, upon determining that the court had power to order the sale, will enter a decree ordering a sale of the land.

[Clements, et al. v. Faulk & Co., et al.]

4. *Deeds; After Acquired Title*.—Where two of eight children of a deceased owner of land conveyed their undivided interest in the land, with covenants of warranty as to title, and one of the other eight children subsequently died, the interest of the grantors in the land as the heirs of such other child did not pass under the deed to their grantee, since the covenants referred only to the interest which they intended to and in fact did convey.

APPEAL from Geneva Chancery Court.

Heard before Hon. L. D. GARDNER.

Bill by Nettie Clements and others against T. S. Faulk & Co., and others for the sale of land for partition. From a decree denying relief because the court was uncertain as to its power to order the sale, complainants appeal. Reversed, rendered and remanded.

W. O. MULKEY, for appellant. This is a friendly suit for partition, and relief was denied because the chancellor doubted his power to make the sale. It is conceded that as against a life tenant or a tenant for years, the land may not be sold or partitioned without his consent where his estate extends to the whole land, and is not held in common with others.—*Fies v. Rosser*, 162 Ala. 504. But it is contended that where the widow and those interested jointly and severally with her agrees, the court may, if it deems it to the best interest of the widow and minor order partition under section 4196, Code 1907.—*Fitts v. Craddock*, 144 Ala. 433; 91 Ala. 273; 30 Cyc. 186; 102 Am. St. Rep. 713.

No counsel marked for appellee.

DE GRAFFENRIED, J.—The complainants, who are the widow and minor children of J. N. Clements, deceased, and to whom as such widow and minor children 160 acres of the lands of said deceased have been set apart as a homestead, filed this bill against the adult heirs of said Clements, or their grantees, and pray for

[Clements, et al. v. Faulk & Co., et al.]

a sale of said lands. The bill alleges that the lands cannot be equitably divided among the owners thereof, that all parties interested in the lands desire a sale thereof, that it is to the interest of the minors that the lands be sold, and prays that, when the sale is had and the purchase money is paid, the value of the life estate of the widow and the right of occupancy of each minor of said land be ascertained, and that such sum shall be added to the interest of the minors in the remainder, and that the sum so ascertained shall be reinvested under the orders of the court for the benefit of such widow and minor children. The bill further prays that the remainder of the purchase money shall be paid over to the adult heirs.

1. The widow in the instant case, when this bill was filed, had a life estate in the lands, subject, of course, to the right of use and occupancy which section 4196 of the Code secures to the minor children. So long as the children remain minors, their rights of use and occupancy of the lands are equal to that of the widow, but by the express terms of the statute the widow (the estate of the husband being solvent) at the time of the filing of this bill had a life estate, and only a life estate, in the lands. She was not, however, at the time of the filing of the bill alone entitled to the use and enjoyment of the property. Her minor children during their minority were entitled to the use and enjoyment of the property along with her, and they are interested, along with the respondents, who are adults, as tenants in common in the remainder. The widow expresses in this bill her consent for the property to be sold, and relinquishes, for that purpose, her right of occupancy of the property during her life. So far as this bill is concerned, the effect of the bill is to relinquish to the parties to the bill the life estate of the widow in the lands,

[Clements, et al. v. Faulk & Co., et al.]

and this court has held that one who has a present use or enjoyment of land, and who, as a remainderman dependent upon the termination of such present use or enjoyment, is entitled to share in the proceeds of the sale of the lands, may file a bill to sell such lands (if they cannot be equitably partitioned) for the purposes of distribution among the tenants in common thereof, although some of the parties interested in the lands may be remaindermen only.—*Fies et al. v. Rosser*, 162 Ala. 505, 50 South. 287, 136 Am. St. Rep. 57.

Of course, in a case like the present, the widow cannot alone file such a bill. She is, at best, a mere life tenant without interest in the remainder.—*Fies et al. v. Rosser, supra*. In fact, when there are adult and minor children, as in this case, it cannot be affirmed that the death of the widow will terminate the particular estate created by said section 4196 of the Code. She may die during the minority of some of the children, and, in that event, the particular estate will not be determined until the youngest child arrives at lawful age.—Code, § 4196. When, however, the widow and minor children, as in the present case, all join as complainants in the bill of complaint, it can be affirmed that the entire particular estate created by section 4196 of the Code is represented, and we can see no reason why, when such is the case, a court of equity, if convinced that it is to the interest of the minors for such a sale to be had, has not the power to order a sale of the lands for distribution (if the lands cannot be equally divided ed), and out of the proceeds of the sale reserve that part which in equity belongs to the widow and minors, reinvest it for their benefit subject to the limitations imposed by section 4196 of the Code, and pay over to the adults the balance.—*Fies et al. v. Rosser, supra*.

[Clements, et al. v. Faulk & Co., et al.]

We emphasize the above statement, "if convinced that it is to the interest of such minors for such a sale to be had," as qualifying this right to resort to a court of equity for the above purpose. The widow, being *sui juris*, is not so much the object of solicitude on the part of a court of equity as is a minor, of whom a court of equity is in fact the guardian. Such a sale, involving, as it does, the delicate rights which are conferred upon widows and minor children by virtue of our exemption statutes and the disposition of the homestead—the shelter of the family—can only be effected through the medium of a court of equity. It is, of course, necessary to the maintenance of a bill seeking the relief prayed for in this bill, for the widow to assent to the sale of the property. She has a life estate to the exclusion of all persons after the youngest child arrives at lawful age, and, without the widow's assent to such proceeding, a court of equity would be powerless to sell her life estate.

2. When an estate is insolvent, the homestead vests absolutely in the widow and minor children as tenants in common.—Code of Alabama, § 4196. This being true, unless restrained from so doing, on arriving at lawful age, the oldest child would have the right to have such homestead partitioned, or, if not capable of equitable division, then sold for the purposes of distribution. This being true, the above section 4196 provides that such estate "shall not be sold or partitioned by order of any court until the *death* of the *widow* and the *youngest* child is of age, except by the order of the chancery court for reinvestment with the consent of the widow in writing, if living." We think that the above quoted portion of the statute, which is expressly made applicable to homesteads which vest *absolutely*

[Clements, et al. v. Faulk & Co., et al.]

by reason of the insolvency of the deceased, is strongly persuasive of the proposition that as to the estates which, by reason of the solvency of the deceased, the homestead does not vest absolutely, the Legislature recognized that a court of equity possessed the power which the complainants in this case invoke. We think that the Legislature intended, by the quoted provision, to place the same limitations upon the power of courts to order the sale of a homestead which vests absolutely, as, under the general rules of law already existing, appertained to a sale of a homestead which, by reason of the solvency of the estate of the deceased, did not vest absolutely. In other words, we think that the Legislature intended, by the quoted provision, to declare that a homestead which vests absolutely shall not be sold under the orders of a court, unless, under the same conditions, a homestead which does not vest absolutely could also be sold under the orders of a court. The Legislature in creating the two characters of homestead was actuated by the same general purpose, and we see no reason why the same rules should not govern the sale of each character of homestead.

3. This suit is entirely friendly. The learned chancellor refused the complainants relief because of the uncertainty which existed as to his power to order a sale of the lands for the purposes prayed for, and not because the complainants failed to prove the allegations of their bill of complaint. This being true, as the evidence in the case authorizes the granting of the relief for which the complainants pray in their bill, a decree is here rendered ordering the lands to be sold for the purposes prayed for in the bill of complaint, and the cause is reversed in order that the court below may make such other orders and decrees in the premises as

[Clements, et al. v. Faulk & Co., et al.]

may effectuate the sale and result in a proper investment of that part of the proceeds of the sale which belong to complainants.

4. Prior to the filing of the bill of complaint two of the adult children of said J. N. Clements, deceased, sold their undivided interest in remainder in the said lands by deeds with covenants of warranty as to title to T. S. Faulk and O. N. Faulk. There were eight children, and each child, therefore, owned an undivided one-eighth interest in the land. The deeds from the two children above mentioned conveyed only that interest in the land which they then owned, as the deeds profess to convey their interest in the lands, and this interest is, of course, referable to the interest which they owned at the time said conveyances were made.

Since the filing of this bill one of the minor children has died. The undivided one-eighth interest in remainder in said lands which belonged to said minor descended at the time of his death to the heirs of said minor. and T. S. Faulk and O. N. Faulk take no interest in said minor's one-eighth interest in remainder by virtue of the purchase above referred to. The grantors in the deeds to T. S. Faulk and O. N. Faulk only conveyed the interest which they owned in the lands at the date of the conveyance, and the covenants of warranty can only refer to the interest which they then undertook, intended, and, in fact, conveyed. The covenants of warranty cannot be construed as covering any future interest which the grantors might by purchase or inheritance acquire in the other undivided six-eighth interest in the the land, to which at the time of the conveyances to said T. S. Faulk and O. N. Faulk the said grantors had no right or title whatever, and to which by said conveyances they intend to convey no right or title whatso-

[Nolen v. East.]

ever. We cite no authority to sustain this position, as we deem a citation of authority unnecessary.

Reversed, rendered, and remanded.

DOWDELL, C. J., and ANDERSON and MAYFIELD, JJ.,
concur.

Nolen v. East.

Bill for an Accounting and Cancellation.

(Decided February 13, 1913. 61 South, 261.)

1. *Homestead; Nature of Estate or Right.*—The purpose of the constitutional homestead exemption is the protection of the dwelling place, and while usually a homestead is accompanied by an interest or estate, there is no limitation to any particular estate as to quality, extent or duration.

2. *Same; Transfer of; Requisites.*—Where a married man was in possession under bond for title, and made an agreement with a third person to pay the balance of the purchase money, such third person to take a deed for the land with an agreement to convey to the purchaser in possession on repayment of the loan, such agreement could not operate as a conveyance or assignment of the purchaser's homestead interest, although he may have had only an equitable title to same.

3. *Same; Action to Protect; Offer to Do Equity.*—Where a purchaser under bond for title in possession procures a third person to pay the balance of the purchase price, taking a deed to himself with agreement to convey to the purchaser on repayment of the money advanced, and the purchaser under bond for title offers to pay such person all the money advanced by him for the payment of the purchase price, the offer to do equity is sufficient and entitles the purchaser to a conveyance from such third person.

APPEAL from Tallapoosa Chancery Court.

Heard before Hon. W. W. WHITESIDE.

Bill by R. F. East against I. N. Nolen to declare a deed a mortgage, for an accounting and a cancellation on payment of the amount found due, and to call in and cancel a deed from Dunnaway to Nolen, and require Nolen to execute a deed conveying the land to ora-

[Nolen v. East.]

tor. Decree for complainant, and respondent appeals. Affirmed.

Orator relies upon the following facts: In the year 1902 he contracted with Dunaway to purchase a tract of land from said Dunaway, which is described, the consideration being \$600, with interest. That, while the notes which he executed to Dunaway were in the form of rent notes, it was agreed between the parties that, on payment of the notes in full, the said Dunaway would execute to orator a deed, conveying to him said lands, and it was so stipulated, and said Dunaway bound himself to do so by a bond for title. That orator went into possession, and still resides on the land, and has made payment on the notes from time to time, having paid about \$400. That the notes were transferred to Bass and Heard, who were demanding payment, and that orator went to Nolen, and requested a loan of money sufficient to pay the notes, offering a mortgage on said land as security, and the said Nolen agreed to let him have the money, and that, when he, Nolen, and Dunaway met to close the matter up by having Dunaway execute a deed to the land, said Nolen stated that he would prefer to have a deed to the land from said Dunaway, instead of taking a mortgage, and that, after some discussion, orator agreed, and the said Nolen agreed, that when orator repaid the money with interest, he would make orator a deed to said land, and that in accordance with said agreement Dunaway executed a deed to Nolen for the land, and said Nolen paid Dunaway the balance of the purchase money, with interest, after orator had paid an additional sum of \$50 thereon to what orator had formerly paid. It is then alleged that in 1909 orator paid Nolen \$122 as part of the purchase money as agreed, and that he is entitled to a credit of that much on his indebtedness to

[Nolen v. East.]

Nolen. It is then alleged that Nolen was claiming that he is the owner of the land, and that orator is a tenant, and is seeking to compel orator to pay rent. It is then alleged that at the time of the said transaction in which the deed was made Nolen, that orator was living on the land with his family and occupying it as a homestead, and has been ever since he contracted to purchase it from Dunnaway, and that he has made valuable improvements thereon, and has offered, and is now ready, to pay Nolen the balance due thereon.

RIDDLE, ELLIS, RIDDLE & PRUET, for appellant. The bill was demurrable because it fails to show a debt due from East to Nolen which Nolen could enforce.—*Turner v. Wilkerson*, 72 Ala. 361. It must appear by clear and convincing evidence that the conveyance was intended to operate only as a security for the debt.—*Turner v. Wilkerson*, *supra*.

JAMES W. STROTHER, for appellee. The bill undoubtedly contains equity and if supported by the evidence entitles complainant to relief.—*Palmer v. Palmer*, 88 Ala. 545; *Hughes v. McKenzie*, 101 Ala. 415; *Daniels v. Lowery*, 92 Ala. 519; *Rose v. Gandy*, 137 Ala. 329. The complainant could not make a valid conveyance of his homestead without the proper execution by the wife, and this is true whether the character of the estate be legal or equitable, in fee simple or for life.—*Watts v. Gordon*, 65 Ala. 546; *Tyler v. Jewett*, 82 Ala. 93; *Griffin v. Chattanooga Southern*, 127 Ala. 570; *Winston v. Hodges*, 102 Ala. 304. There was sufficient offer to do equity.

ANDERSON, J.—As has been several times observed by this court in discussing the homestead exemption:

[Nolen v. East.]

"The great controlling purpose and policy of the Constitution is the protection, the preservation of the homestead—the dwelling place—the roof that shelters. The Constitution and statutes protect it from liability to the payment of debts, and, when the owner is a married man, subject to the restrained alienation. * * * Usually it is accompanied by an estate or interest; but, if it is not, it is the misfortune of the occupant."—*Griffin v. Chattanooga R. R. Co.*, 127 Ala. 572, 30 South. 524, 85 Am. St. Rep. 143; *Watts v. Gordon*, 65 Ala. 546. "There is no limitation to any particular estate, either as to duration, quality, or extent. It is the land upon which the dwelling place of the family is located, used, and occupied as a home which the Constitution and statute protects, however inferior may be the title, or limited the estate or interest."—*Tyler v. Jewett*, 82 Ala. 93, 2 South. 905; *Bailey v. Dunlap Co.*, 138 Ala. 415, 35 South. 451.

It may be true, that Dunnaway, the vendor, who gave the complainant a bond for title, had the legal title to the land when he conveyed the same to the respondent Nolen, and that Nolen, not only paid the balance of the purchase money due from the complainant East to Dunnaway, but did so at the request of the said East; still East was in the possession of the land as a homestead with an equitable title or claim, under his purchase from Dunnaway, and, as he was a married man, he could only convey his interest in said homestead as is required by law. Therefore the arrangement between the complainant and the respondent by which Nolen was to pay Dunnaway and take a deed for the land, whether it was intended that Nolen was to get a conditional or unconditional title to the land, could not and did not operate as a conveyance or assignment of the

[*Heard & Lee, et al. v. Heard.*]

complainant's homestead, notwithstanding he may have had only an equitable title to same.

Whether Nolen did or did not acquire the vendor's lien of Dunnaway upon paying the purchase money due him at the request of the vendee, *East (Scott v. Land Co., 127 Ala. 165, 28 South. 709; Chapman v. Abrahams, 61 Ala. 108; Pettus v. McKinney, 74 Ala. 108)*, matters not, as the said Nolen has the legal title to the land which cannot be divested except by a court of equity, and he who seeks equity must do equity. The rule is analogous which governs when a mortgagor seeks to redeem.—*Tyler v. Jewett, supra*. The complainant has brought himself within the requirement of this just and equitable rule by offering to pay the respondent all that he paid Dunnaway in the way of purchase money due upon the land.

The decree of the chancery court is affirmed.

Affirmed.

DOWDELL, C. J., and MAYFIELD and DE GRAFFENRIED, J.J., concur.

Heard & Lee, et al. v. Heard.

Bill for an Accounting, and to Declare an Assignment a Mortgage.

(Decided February 6, 1913. 61 South. 343.)

1. *Mortgages; Interests Subject to; Conditional Sales.*—The instrument executed between the mortgage company and Heard examined and held to be a contract of conditional sale of the property therein mentioned, and hence, Heard acquired such an interest therein as was subject to mortgage.

2. *Same; Contract.*—The endorsement on a conditional contract of sale examined, and held to constitute in equity a mortgage between complainants and defendant of such interest as complainant had in the property therein mentioned.

[Heard & Lee, et al. v. Heard.]

3. *Same; Equity of Redemption.*—The mortgagor's equity of redemption was not extinguished by the payment by his equitable mortgagees, holding a mortgage on rights under a conditional sale of land to the mortgagor, of the amount owed by the mortgagor to his vendors to entitle him to the land.

4. *Same; Redemption; Laches.*—Where a bill was filed in 1903, by the mortgagor against the mortgagees for equitable relief on the ground of fraud, and such bill was dismissed in 1905, a bill for redemption filed in 1908, was not barred by laches.

5. *Judgment; Conclusiveness; Legal and Equitable Issues.*—A former judgment in unlawful detainer, the suit having been properly converted into a contest of title, did not conclude issues of a purely equitable nature in such sense as to bar a subsequent equitable action for their litigation.

6. *Sales; Damages; Breach.*—The measure of damages for breach of an agreement to deliver personal property at a particular time and place is the market value of such property at such time.

7. *Appeal and Error; Assignments.*—If any of the exceptions to the report of the register were properly overruled an assignment of error as to the overruling of objections and exceptions to a referee's report on reference, and confirming such report is not sustained.

APPEAL from Tallapoosa Chancery Court.

Heard before Hon. W. W. WHITESIDE.

Bill by George Heard against Heard & Lee for reference to ascertain who has paid and how much has been paid by the respondents or either of them as purchase money, and to ascertain the amount of indebtedness between said parties, and to declare an assignment a mortgage. From a decree for complainant, respondents appeal. Affirmed.

The contract referred to in the opinion is as follows: "This contract between the American Freehold Land Mortgage Company of London, Limited, of the first part, and George Heard of the second part, witnesseth: Said party of the first part agrees to lease to the party of the second part a certain piece of land described as follows: [Here follows description of 250 acres of land.] And the party of the second part agrees to pay the sum of \$250 on or before Nov. 1, 1895, and do hereby pledge and mortgage for the faithful payment hereof his whole crop of cotton and corn grown and growing

[*Heard & Lee, et al. v. Heard.*]

upon said land, for and during said year of 1895. It is further stipulated and agreed that the party of the second part shall have the privilege of making a contract for seven successive years after the present one similar to this contract, in all respects, except as to the amount to be paid as rent, which for the year 1896, shall be \$205 [Here follow the amounts for the succeeding six years], and should said party of the second part renew this contract aforesaid for said seven years, and make said payments as stipulated on said land faithfully and truly for the period of eight years successively including the present year, then the party of the first part agrees to sell said land and make a warranty deed conveying the same to said party of the second part, if the said party of the second part desires to purchase the same, for the consideration of one dollar, and the amount of money with legal interest thereon expended in payments pending this contract. This agreement is, however, special and personal between the said parties of the first and second part, or his heirs, and said party of the second part cannot sell this privilege of releasing or purchasing the said land without the consent in writing of the party of the first part endorsed hereon, and it is expressly stipulated that should the party of the second part move off said land, he hereby forfeits and surrenders the privilege of releasing and purchasing as aforesaid."

BULGER & RYLAND, for appellant. The court was in error in overruling demurrers to the original bill, as complainant's right of redemption came into existence in 1899, and the bill was not filed till 1908.—*Goree v. Clements*, 94 Ala. 337; *Gilmer v. Norris*, 80 Ala. 78; *Norton v. B. A. M. Co.*, 113 Ala. 110. The law requires that he should act with reasonable diligence, and the

[*Heard & Lee, et al. v. Heard.*]

bill shows that he has not done so.—*Algood v. Bank*, 115 Ala. 418; *Coleman v. Bank*, 115 Ala. 307. There was no agreement for an absolute sale of land, and the grounds raising this question should have been sustained.—*Peck v. Ashurst*, 108 Ala. 429; *Homan v. Stewart*, 103 Ala. 644; *Chadwick v. Chadwick*, 121 Ala. 520. Appellant was not entitled to the relief prayed and the court erred in making final decree ordering a reference.—*Woodruff v. Adair*, 131 Ala. 530. If entitled to redeem the right had been lost.—Authorities first cited. The respondents were entitled to be allowed the highest market price of the cotton from the time the debt was due until the reference was held.—*Burke v. Hubbard*, 69 Ala. 379; *Boutwell v. Parker*, 124 Ala. 341.

JAMES W. STROTHER, and THAD H. WATKINS, for appellee. A single assignment to the overruling of demurrers as a whole is not sustained if any ground of demurrer was properly overruled.—*Aetna L. I. Co. v. Jaseter*, 153 Ala. 630. The contract was one of sale, and must be enforced according to the intention.—*Davis v. Roberts*, 89 Ala. 402; 16 Am. St. Rep. 298, and note. Equity has jurisdiction to declare a deed, absolute on its face, a mortgage, or as a security for a debt, and this is true whether the deed be executed direct from the debtor to his creditor, or whether it is procured to be executed by the debtor from another person to his creditor for this purpose.—*Turner v. Wilkerson*, 72 Ala. 361; *Hughes v. McKenzie*, 101 Ala. 415; *Glass v. Hieronymous*, 125 Ala. 148; *Richter v. Nall*, 128 Ala. 198; *Rose v. Gandy*, 137 Ala. 329. A single assignment of error covering several rulings of the court is not sustained if any of the rulings were correct.—*Thompson v. N. C. & St. L.*, 160 Ala. 590; *Mobile County v. Bromberg*, 141 Ala. 258.

[Heard & Lee, et al. v. Heard.]

McCLELLAN, J.—On February 8, 1899, George Heard, the complainant (appellee), was in possession of the lands described in the bill. This possession was under a written contract with the American Freehold Land Mortgage Company, then holding the legal title thereto. The report of the appeal will contain a copy of that instrument. On the aforesaid date, the appellee, being then indebted to Heard & Lee (the appellants), executed to them the following transfer, indorsed on the back of the contract, of his interest and rights in his contract with the mortgage company: "This is to certify that I have this day for value rec'd transferred to Heard & Lee my entire rights and interest invested in me in the within paper and this day do release to the said Heard & Lee all my rights a (as) landlord to the within described real estate." On the same day appellee executed to Heard & Lee an instrument of which the following is the substance: "Know all men by these presents that I, George Heard, have this day transferred to the firm of Heard and Lee my entire interest as landlord to a certain place on which I now live located in Tallapoosa county, state. The consideration of said transfer being a certain indebtedness to the said firm, which I now owe, now in case I, George Heard, paid the said Heard & Lee the amount in full which I now owe them or which I may owe them during the year 1899, in that event the said transfer of my rights as landlord this day transferred to said Heard & Lee shall be null and void, and this contract they now hold shall be delivered to me, George Heard. In case I, George Heard, shall fail to pay the said Heard & Lee the indebtedness as above mentioned or any part of same in that event the transfer of my rights of landlord shall remain in full force and effect." The transfer of the contract with the mortgage company appears to

[*Heard & Lee, et al. v. Heard.*]

have been recognized by that company's agent on February 10, 1899. On February 8, 1899, appellee rented the lands in question for the year 1899 from Heard & Lee. Appellee failed to pay the indebtedness as stipulated, whereupon appellee was ejected from the possession of the lands in suit. In 1902 the mortgage company conveyed to Heard & Lee the lands described in its contract with George Heard. Prior to the institution of this cause George Heard sought relief in equity on the theory that the transfer stated was procured by fraud. Relief was denied; the chancellor suggesting in his opinion that George Heard's remedy was by bill to protect and enforce his rights as a mortgagor to Heard & Lee as mortgagees. The present bill proceeded on that theory, praying an accounting between the parties and redemption of the lands.

The equity of the bill is undoubted. While the contract between George Heard and the mortgage company was phrased as for a leasing, yet its whole tenor—with particular reference to the right assured Heard to take title by a nominal payment plus the taxes, provided he had annually paid the sum stipulated as for rent—shows the engagement to have been one of conditional, contingent, purchase and sale. The interest with which George Heard became invested under the contract was such as could be made the subject of mortgage.—1 Jones on Mortg. § 136.

In equity the transaction between appellee and appellants of February 8, 1899, was as the learned chancellor pointed out in his deliverance in the former cause one of mortgage—a securing of a then subsisting and a later to be incurred indebtedness by Heard to Heard & Lee. There has been, when this bill was filed, no enforcement of their rights as mortgagees.

[*Heard & Lee, et al. v. Heard.*]

In this state of relation between the parties and to the lands in question, the act of Heard & Lee in paying off the mortgage company and taking title in their own names did not extinguish the equitable rights of George Heard—among which was his equity of redemption.

The former bill was filed in 1903, and dismissed in 1905. This bill was filed in 1908. The equity of redemption was not then barred. We do not think the appellee can be concluded by laches. The demurrers were properly overruled.

The unreversed judgment in the unlawful detainer suit (converted into a contest of title in the circuit court by the invocation of the statutes [Code, § 4283-5]) did not conclude the matters and issues of a purely equitable nature, upon which equity's jurisdiction is invoked by this bill.—*Harper v. Campbell*, 102 Ala. 342, 14 South. 650. The special plea filed September 18, 1908, to that effect, was hence without merit or avail.

The appellants question the court's ruling on their exceptions to the report of the register in this manner only: "The court erred in overruling respondents' objections and exceptions in (to) the register's report on reference and confirming said report." Under such an assignment, if any of the exceptions to the report were properly overruled, the appellants can take nothing thereby. Such is the established rule as to like assignments assailing rulings on two or more pleas.—*Thompson v. N. C. & St. L. R. R. Co.*, 160 Ala. 590, 49 South. 340, among others. The reason and necessity of the rule is emphasized when matters of extended accounting on a reference before the register are the real subjects of complaint in this court. Not all (if any) of the exceptions to the register's report in this cause are well taken.

[Cruise, et al. v. Sorrell.]

The first one is that the appellee should have been charged for undelivered lint cotton at the highest market value thereof between the time it should have been delivered and the date of the reference. Such is upon proper occasion the rule in cases of conversion. But, where the engagement unobserved is to deliver a certain article at a particular time and place, the measure of the damages is the market value thereof at that time.

The decree is affirmed.

Affirmed.

DOWDELL, C. J., and SAYRE and SOMERVILLE, JJ.,
concur.

Cruise, et al. v. Sorrell.

Creditor's Bill.

(Decided May 1, 1913. 61 South. 894.)

1. *Fraudulent Conveyance; Bill to Set Aside; Right of Action.*—A judgment creditor whose execution has been returned "no property found" may maintain a bill under section 4298, Code 1907, to set aside a conveyance as void as made to hinder, delay or defraud, without being required to resort to a bill under sections 3735-3744, Code 1907.

2. *Same; Sufficiency.*—A bill to set aside a fraudulent conveyance which alleged complainant to be a judgment creditor of the grantor in the deed, the issuance of execution and its return "no property found," the relation of husband and wife between the grantor and the grantee in the deed that the consideration recited was simulated and fictitious, that the property greatly exceeded in value the consideration recited and that it constituted substantially all the grantor's property and that it was made with an actual intent to hinder, delay and defraud the grantor's creditors, of whom complainant was one, was sufficient.

APPEAL from Autauga Circuit Court.

Heard before Hon. W. W. PEARSON.

[Cruise, et al. v. Sorrell.]

Bill by James M. Sorrell against A. C. Cruise and others, to set aside a conveyance because made with the intent to hinder, delay and defraud creditors. Decree for complainant and respondent appeals. Affirmed.

JEROME T. FULLER, and H. E. GIPSON, for appellant. The court erred in overruling the 7th, 8th, 9th and 10th grounds of demurrer.—*Tutwiler v. Building & L. Assn.*, 127 Ala. 103; *Barrett v. Century Co.*, 130 Ala. 298; *Flewellen v. Crane*, 58 Ala. 627; *Bell v. So. H. B. & L. Assn.*, 37 South. 230. The bill did not state sufficient facts to support the conclusion of fraud.—*Reynolds v. Excelsior C. Co.*, 100 Ala. 298; *Louchem v. Bank*, 13 South. 374; *Green v. Emmens*, 135 Ala. 563. The bill fails to state the facts essential to the rights of complainant with that clearness that will inform defendant certainly of the case he is called on to defend.—*Sims. Ch. Pr.*, sec. 188; *Seals v. Robinson*, 75 Ala. 368; *Duckworth v. Duckorth*, 35 Ala. 70. Where the debt is bona fide, the value of the property not greatly disproportionate to the amount of the debt, and no interest or benefit is reserved to the debtor the conveyance will be upheld.—*Levy v. Williams*, 79 Ala. 171; *Rogers v. Coleman*, 76 Ala. 103. Under the evidence, and the above cited authority, the court erred in the decree rendered.

W. A. GUNTER, for appellee. The court properly overruled the demurrers to the bill.—*Francis v. Page*, 97 Ala. 379; *Yeend v. Weeks*, 104 Ala. 321; *Thompson v. Tower Mfg. Co.*, 104 Ala. 143. Only parties who are improperly brought in can complain of a misjoinder.—*Moore v. Curry*, 67 Ala. 274; *Robinson v. Robinson*, 44 Ala. 227. The assignment is joint, and of course if it was not prejudicial to one of the appellants, the court will not consider it.—*Woodruff v. Smith*, 132 Ala. 81;

[Cruise, et al. v. Sorrell.]

Hillens v. Brinsfield, 113 Ala. 304. The assignment as to the final decree is too broad and fails to point out the errors insisted on.—Authorities *supra*. The bill was in all respects sufficient as a creditor's bill.—*Thompson v. Tower Mfg. Co.*, *supra*; *Yeend v. Weeks*, *supra*; *Young v. Brady*, 21 Ala. 264; *B'ham D. G. Co. v. Roden*, 110 Ala. 511. Under the facts, the whole deed is void and the bill is sustained.—*Robinson v. Murphy*, 69 Ala. 543; *Alexander v. Ray*, 50 Ala. 542.

MAYFIELD, J.—This is a typical creditors' bill. Its objects is to set aside a conveyance by a debtor husband to his wife of substantially all of his property. The reports are full of just such cases. The text-books and reports of adjudged cases teach us that when a male married debtor becomes embarrassed by demands which he cannot pay without a sacrifice of all his property he usually attempts to save his property and postpone the evil day by conveying his property to his wife in payment of alleged debt which he owes her. Sometimes he is a real debtor of his wife in an amount in excess of the value of his property, and in such cases the conveyance is not a fraud upon the husband's other creditors, though, in such cases, if it conveys substantially all the husband's property, it amounts, in law and in equity, to a general assignment for the benefit of all his creditors, under the provisions of section 4295 of the Code. The question as to general assignments, however, is not in this case.

The bill in this case rests solely upon the question of fraud, or an attempt to hinder, delay, or defraud creditors. The conveyance is attempted to be set aside because void under the provisions of section 4293 of the Code.

[Cruise, et al. v. Sorrell.]

The complainant in this case, being a judgment creditor, and an execution having been returned "No property found," is not driven to the necessity of filing his bill under any of the sections of chapter 72, nor under sections 3735-3744, of the Code, pertaining to creditors' bills.

The bill alleges the relation of judgment debtor and creditor, the issuance of execution and its return with the indorsement "No property found," the relation of husband and wife between the grantor and the grantee; that the recited consideration of \$1,500 was fictitious and simulated; that the property conveyed was of value greatly in excess of the recited consideration; that the property conveyed constituted substantially all the debtor's property; and that the conveyance was made with the actual intent to hinder, delay, and defraud the creditors of the grantor, one of whom was the complainant. The allegations of the bill were therefore sufficient, under the authority of all the text-books and the adjudged cases upon the subject.

The respondents answered this bill and, in effect, denied the equities of the bill. There is some difference between counsel as to whether the amended answer was filed, and as to what evidence was in fact introduced on the final hearing; but it certainly appears from this record that the case was heard by the chancellor on the full merits of the cause as made by the pleadings and the evidence. The record has been examined carefully, as is required on an appeal from such decrees, by this court, without any presumption in favor of the finding of the chancellor upon the facts; and we have reached the conclusion that the chancellor was correct in his rulings on the demurrer to the bill and in his finding as to facts; that the decree rendered by him is in all

[Thornton v. Esco, et al.]

things correct; and that it ought to be, and it hereby is, in all things affirmed.

Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

Thornton v. Esco, et al.

Bill to Enforce Vendor's Lien.

(Decided February 6, 1913. 61 South. 255.)

1. *Husband and Wife: Wife as Surety; Payment of Husband's Debt.*—While a wife may not, under our statute, become surety for the debts of her husband, either directly or indirectly, yet she will not be heard in equity to impeach a fair and free conveyance made by her in absolute discharge of the husband's debt.

2. *Vendor and Purchaser: Lien; Enforcement.*—The evidence considered and it is held that it falls to show an indebtedness of the purchaser to the vendor in such a sense as to sustain the burden on complainant to show such indebtedness.

3. *Same.*—Where the suit was to enforce a vendor's lien on property that had been sold and transferred by the purchaser' a denial by the purchaser's transferee of any indebtedness due from the original purchaser to his vendor on account of the purchase money raises an issue of fact to be determined by the appellate court on consideration of the evidence, in which no weight can be given to the decision of the Chancellor (sec. 5955, Code 1907).

APPEAL from Chilton Chancery Court.

Heard before Hon. W. W. WHITESIDE.

Bill by Lula Esco and others against Emmett L. Thornton, to enforce vendor's lien. From a decree for complainants respondents appeal. Reversed, rendered in part and remanded.

J. M. CHILTON, for appellant. Under the circumstances of this case, the burden was on the complainant to prove by clear and satisfactory evidence the existence of a debt from their vendee.—*Adams v. Adams*, 127 Ala. 518; 14 Enc. of Evid. 135. There was a variance

[Thornton v. Esco, et al.]

between the allegations and the proof.—*Kyle v. Bellinger*, 79 Ala. 516. Thornton was a purchaser for value without notice.—*Alston v. Marshall*, 112 Ala. 638. There being no record of the mortgage or other indebtedness, the burden of proving notice rests on the complainant.—*Center v. P. & M. Bank*, 22 Ala. 743; *Nolen v. Gwyn*, 16 Ala. 725; *Vann v. Mayberry*, 100 Ala. 438. There is no inhibition against the right of the wife to sell her property in absolute payment of her husband's debt.—*Glidden v. Powell*, 108 Ala. 621; *Hollingsworth v. Hill*, 116 Ala. 184; *Pratt Co. v. McLean*, 135 Ala. 468. Every negotiable instrument is deemed prima facie supported by a valuable consideration, and every signature thereto to be a party for value.—Section 4981, Code 1907. There is no evidence that Mrs. Glenn was a surety for her husband.—*Gafford v. Speaker*, 125 Ala. 498. Under the pleading no lien was created.—4 Mayf. 1097. There can be no merger of estates where such a result would be productive of injustice to the mortgagee.—27 Cyc. 1381. The defense of coverture being a personal one, the grantee of a married woman cannot avoid her deed on the ground that she was incompetent to convey, and her creditors cannot claim any rights by reason of her disabilities as such.—*Strauss v. Glass*, 108 Ala. 546; *Carter v. Fisher*, 127 Ala. 63; *Moore v. Price*, 116 Ala. 249; *Scarborough v. Borders*, 115 Ala. 440; 21 Cyc. 1333.

W. A. GUNTER, for appellee. The party called to account cannot question how the proceeds of a collection from him is divided between the adverse parties.—*Green v. Casey*, 70 Ala. 418; *Nix v. Winters*, 35 Ala. 309; *McLane v. Riddle*, 19 Ala. 180; 1 Daniels Ch. 190, et seq. As Thornton had dealings only with Glenn, the signature of Glenn's wife to the notes and mortgages could only operate and prima facie did operate as a

[Thornton v. Esco, et al.]

mere surety for the debt of her husband, and were nullities.—Sec. 4497, Code 1907, and authorities cited; *Richardson v. Stephens*, 114 Ala. 238.

SAYRE, J.—The bill in this case was filed by appellees to foreclose an alleged vendor's lien against a certain 152-acre tract of land. Esco had sold the land to Glenn and wife, and they are parties defendant, but they in turn had sold to Thornton, and he is the real defendant. Glenn had been indebted to Thornton, and his indebtedness had been secured by notes and a mortgage, in the execution of which his wife had joined. In the court below it was correctly held that Thornton had taken his mortgage in good faith, and without notice of complainant's alleged lien, and a decree was rendered, on Thornton's cross-bill, foreclosing as against Glenn's interest; but the mortgage, so far as it purported to affect Mrs. Glenn's undivided interest, was held void, for the reason that it had been given to secure the debt of her husband, and as to it the lien claimed was affirmed and enforced. After the mortgage debt had fallen due in part without being paid, Thornton took a deed of the tract in satisfaction of the entire debt due him, and he relies upon this deed also to defeat the lien claimed by appellees. The wife, though she cannot, directly or indirectly, become the surety for her husband, cannot rely upon the marital relation for the impeachment of her own free and fair conveyance made in absolute discharge and payment of his debt. But Thornton admits that, in the interval between his mortgage and his deed, he was told by Esco of his claim that the Glenns had never paid any part of the purchase money claimed by Esco. He would, however, avoid the claim to relief against him in respect of Mrs. Glenn's interest in the property, as he would in respect of Glenn's inter-

[Thornton v. Esco, et al.]

est, had not that been rendered unnecessary by the decree, by a denial which goes to the root of the entire case for complainants—by a denial of any indebtedness due from Glenn to the complainants on account of purchase money. This contention raises an issue of fact to be determined on consideration of the evidence; no weight being given to the decision of the chancellor.—Code, § 5955.

A statement to the last detail of the considerations which have led us to conclude that appellant's contention in respect to the question of fact to which we have referred ought to prevail would involve an unprofitable consumption of time and space. We have, however, thought it proper to outline our reasons.

The deed of Esco and wife, conveying the 152-acre tract to Glenn and wife, was executed on October 15, 1906, and recited a consideration of \$1,500, receipt whereof was acknowledged. Grantors took no evidence whatever of any indebtedness. On the same date the Glenns conveyed to the Escos a tract of 340 acres on a recited consideration of \$1,500. Esco was a merchant, and Glenn at that time was indebted to him in a sum closely approximating the consideration recited in each of these conveyances. We think there can be no doubt (there has been at best but a feeble effort to deny the proposition) that these two properties were of about the same value, acre for acre—that is, they were worth about \$10 an acre—so that the value of the 152-acre tract was about equal to its recited purchase price, while the other tract was worth something more than twice as much. Now appellant insists that the transaction here shown was an exchange of lands, and that Glenn's previous indebtedness to Esco was satisfied in the trade as representing the difference in value between the two tracts. But the parties to that transaction

[Thornton v. Esco, et al.]

testify that the two deeds, though executed at the same time, had no relation to each other, having been determined upon at different times and on independent and unrelated considerations; that the Glenns conveyed their 340-acre homestead tract in order to pay the indebtedness of \$1,500 on account of merchandise, in pursuance of an agreement had months before; and that the deed of the 152-acre tract was made to the Glenns on the latter's promise to pay the other \$1,500, no security or evidence of the debt being taken—a version of the facts lacking in appeal to the credence of men habituated to the observation of such transactions between parties so related and circumstanced. On its face this transaction, as evidenced by the memorials prepared at the time, consists entirely with appellant's theory of the facts; while the improbability of the explanation offered by appellees, in view of the well-established, relative value of the two tracts, must add considerably to the burden of proving their case put upon them by the general rule of law. We would not refer to interest alone, if that were all, as affecting peculiarly the depositions of the complainants; for to some degree that consideration affects the testimony of every witness in matters involving his interest. Other indications must be observed in connection. The case for complainants (appellees) rests mainly upon the testimony of Esco and Glenn, though their wives corroborate them in part. These parties claim that the sale of the 340-acre tract was agreed upon and Glenn credited upon his indebtedness in December or January preceding the transaction in question, but that the making of the deed was delayed because Mrs. Glenn was sick at the time, and would not sign afterwards. The testimony of the witness Gullledge goes to show satisfactorily that the parties probably had in mind at that time a purchase of

[Thornton v. Esco, et al.]

the 340 acre tract by Esco, and that as part of the bargain, Glenn was to be relieved of his indebtedness. But there is nothing in the evidence of this witness and those others who corroborate him on this point to show the full nature or value of the consideration to be paid, nothing to exclude the idea that the parties then contemplated just the transaction evidenced by the face of the memorials made in the succeeding October. And when Esco was being examined a short time after the October transaction in an involuntary proceeding in bankruptcy that had been brought against him, he said that on the occasion of the October transaction he had directed his bookkeeper to close Glenn's account on his books by a credit of the land sale, which was done, as the books showed, in words and figures as follows: "Land deed for \$1,500.00 less account of \$1,465.57 and rent to balance ledger, \$34.43." Complainants say that notes and a mortgage were to be taken for the purchase money of the 152-acre tract, but that none were taken, though the deed was delivered, because, they explain, the negotiation covered a large part of the day, during which Esco took Glenn to look over the place some three or four miles away, and as evening came on Mrs. Glenn had to go home on account of the sickness of some of the children. But this explanation is itself in part improbable, and is discredited by the testimony of C. L. Brown, who seems to be wholly disinterested. Brown, who had a way of writing deeds and papers for people in the neighborhood, testified that the parties to this transaction, in the forenoon, requested him to prepare deeds to both tracts, bringing him at the time deeds from which he was to draw descriptions of the lands; that they stated the considerations as they are stated in the deeds; that they came back after several hours, when, after some further delay, the draft of the deeds

[Thornton v. Esco, et al.]

was finished, and they were delivered to them, and by them taken over to the notary's, where their wives were waiting; but at no time did they mention any notes or mortgage to secure deferred payments, nor was any mention made of them in the hearing of the notary before whom the deeds were executed. The only explanation of this uncontradicted fact which would bring it and the delivery of the deeds without the notes and mortgage, or the mention of them, into accord with the customary and reasonable course of human conduct in such circumstances is that no evidence of debt nor any security was taken or mentioned, for the reason that none were intended.

As for Glenn's testimony, he was not cross-examined; but the record shows that appellant reserved the right to cross-examine at a later time, under rule 52 of the rules of the chancery court, but that, pending the preparation of the case for submission, charges involving moral turpitude were preferred against him, and he became a fugitive from justice. Apart from this, his credibility has been seriously impaired by impeaching witnesses. Even those witnesses brought by complainants to sustain his reputation for truth and veracity speak of him in terms which show their lack of confidence in his character. He says, however, that he made no notes or mortgage, because he was not asked to do so.

Contradictions and inconsistencies in the testimony of complainants in respect of other matters, as for example, in detailing the origin and extent of Mrs. Esco's interest in the property in controversy, which we are not disposed to state at greater length, but which have been pointed out by counsel, tend to shake our confidence in their case.

Upon a survey of the entire case we state our opinion that complainants have not been able to lift the bur-

[Hollis, et al. v. Watkins.]

den of proof imposed upon them by the ordinary rule of law in such cases by the face of the memorials of the transaction prepared by the parties to it, and by certain facts which seem to be established beyond peradventure; and hence that their bill should have been dismissed, and appellant's title to the entire property in question confirmed and settled in him. A decree to that effect will be rendered here. A question as to original complainants' liability to cross-complainant for rents collected by the former pending this suit was not determined in the decree below, and remains open. For its disposition the cause will be remanded for further proceedings.

Reversed, rendered in part, and remanded.

DOWDELL, C. J., and MCCLELLAN and SOMERVILLE, JJ., concur.

Hollis, et al. v. Watkins.

Partition.

(Decided April 23, 1913. 61 South. 893.)

Partition; Estates; Life Estate.—Where seven persons own each an undivided one-seventh interest in land, subject to an undivided one-sixth and one-fourth interest for life vested in two other parties, all the parties are tenants in common, and the fact that two of them held only for life would not defeat a partition of the land.

APPEAL from Lamar Chancery Court.

Heard before Hon. WILLIAM H. SIMPSON.

Bill by Della Watkins against J. L. Hollis, and another, for partition. From a decree overruling demurrers to the bill, respondents appeal. Affirmed.

[Hollis, et al. v. Watkins.]

WALTER NESMITH, and MARTIN & MARTIN, for appellant. The bill shows that two of the respondents own a life estate in an undivided one-third and a one-half interest in the land sought to be divided. This was pointed out by demurrer, and the demurrers should have been sustained.—*Wilkinson v. Stewart*, 74 Ala. 198.

WILSON KELLY, for appellee. All the parties were tenants in common and there was nothing shown in the bill to defeat the right of partition.—*McQueen, et al. v. Turner*, 91 Ala. 272; *Fitts v. Craddock*, 144 Ala. 437. The authority of the case cited by appellant has been rendered nugatory by section 523, Code 1907.

SOMERVILLE, J.—The bill is for the sale of real estate for division among tenants in common, and alleges that complainant and six of the respondents own each an undivided one-seventh interest therein, subject to an undivided one-sixth and one-fourth interest for life vested severally in the other two respondents.

In this state of the title, all of the parties are tenants in common, and the fact that two of them hold only for life is no bar to a sale for division.—*Fitts v. Craddock*, 144 Ala. 437, 39 South. 506; *McQueen v. Turner*, 91 Ala. 273, 8 South. 863; *Gayle v. Johnson*, 80 Ala. 395. The case of *Wilkinson v. Stuart*, 74 Ala. 198, cited in brief for appellant, only holds that partition cannot be had of an estate held entirely in reversion or remainder, and is, of course, not applicable to a case like this.

The demurrer to the bill was properly overruled, and the decree will be affirmed.

Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

[Stegall-Cheairs F. Co. v. Bethune Mule Co. et al.]

**Stegall-Cheairs F. Co. v. Bethune Mule Co.,
et al.**

Bill to Enforce Equitable Lien.

(Decided February 13, 1913. 61 South. 274.)

1. *Lien; Equitable; Definition.*—The term “lien” is used to denote a charge or encumbrance on a thing, where there is neither a jus in re nor jus in rem, nor possession of the thing.

2. *Sales; Equitable Lien; Proceeds of Sale by Merchants.*—The contract examined and the facts stated, and it is held that the seller could not claim an equitable lien on the proceeds of the fertilizer sold by virtue of the contract of sale, as no lien existed on the fertilizer itself.

APPEAL from Henry Chancery Court.

Heard before Hon. L. D. GARDNER.

Bill by the Stegall-Cheairs Fertilizer Company against the Bethune Mule Company and others for an accounting and to declare a lien upon the proceeds of certain guano. Decree for respondents, and complainant appeals. Affirmed.

Exhibit C is as follows: “Abbeville, Ala., Dec. 27, 1910. This agreement between Stegall-Cheairs Fertilizer Company and Robert Newman, parties of the first part, and Bethune Mule Company, parties of the second part, witnesseth: Parties of the first part agree to sell, and do hereby sell, the said Bethune Mule Company all fertilizers which they will use during the season of 1911 at a price to be fixed later. The said parties of the first part agree to sell at a price as cheap as can be obtained by the said Bethune Mule Company from any other reputable manufacturer of fertilizer; it being understood that, in the event the said Bethune Mule Company should secure a price cheaper than the parties of the first part are unable or unwilling to meet,

[Stegall-Cheairs F. Co. v. Bethune Mule Co. et al.]

then the said Bethune Mule Company will have the right to cancel this contract and to purchase elsewhere. It is further understood that the prices referred to apply only to written prices made by reputable manufacturers of fertilizer of equal analyses with the parties of the first part. Second. Settlement for fertilizer sold under this contract is to be made by May 1, 1911; the said Bethune Mule Company agreeing on that day to execute their notes payable November 1, 1911, for the net amount for all fertilizer sold, said notes to be made in equal amounts, one payable to Steagall-Cheairs Fertilizer Company, and the other to Robert Newman. Said Bethune Mule Company also agrees to deliver to parties of the first part, when called for, all cash, notes, accounts, or other proceeds for fertilizer sold, and further agrees to guarantee payment of same. Third. Parties of the first part agree to assist said Bethune Mule Company in the sale of its fertilizer, and not to come in competition, except in so far as is necessary to supply their local customers; and they further agree to sell the fertilizers as it will become necessary for them to furnish at a price to be agreed upon later, which will be satisfactory to both parties. Fourth. This contract applies only to such fertilizers as will be sold and delivered at Abbeville, Ala., and Murphy's Switch."

W. L. LEE, for appellant. Every valid agreement for a lien or a charge on property with the intention of creating a security for a debt that would exist without delivery of the property to the grantor, constitutes an equitable mortgage.—33 Ala. 534; 64 Ala. 357; 72 Ala. 294; 72 Ala. 392; 73 Ala. 155; 105 Ala. 533. Bethune, Capps and Newman were proper parties.—10 Cyc. 1341, et seq. The bill shows that the money, notes and mortgages taken for the guano have been converted and that

[Stegall-Cheairs F. Co. v. Bethune Mule Co. et al.]

no call or demand for their delivery was necessary as it would have been a useless undertaking.—*Ensley L. Co. v. Lewis*, 121 Ala. 94; *Boutwell v. Parker*, 124 Ala. 341; *Haas v. Taylor*, 80 Ala. 459. Under the averments of the bill it cannot be said that Newman or the First National Bank had no notice or knowledge that the notes, cash, etc., received from the Bethune Mule Company, were not the property of complainant and said Newman.—82 Ala. 158; 70 Ala. 199; 99 Ala. 379; 135 Ala. 168; 12 Ala. 545; 10 Cyc. 1053. Under the allegations of the bill Newman could not claim protection that he did not receive enough money, notes, etc., to discharge the Bethune Mule Company's obligation to him, as he was a joint lien holder with complainant in all such notes and mortgages.—*Ashford v. Ashford*, 136 Ala. 631; *Sibley v. Alba*, 95 Ala. 191; *Russell v. Russell*, 62 Ala. 48. The contract was valid.—*W. U. T. Co. v. Chambless*, 122 Ala. 429; *Perryman v. Wolff*, 93 Ala. 290. On the general proposition of an equitable lien see, 25 Cyc. 670; 27 Cyc. 1141; 82 Ala. 607; 11 Ala. 977; 5 Ala. 740; 14 Ala. 702; 53 Ala. 237.

R. W. MILLER, and FOSTER, SAMFORD & CARROLL, for appellee. M. V. Capps and the Bethune Mule Company were improperly made parties.—14 Cyc. 310. The contract was neither a legal assignment nor a legal mortgage, nor did it amount to an equitable mortgage or assignment.—*Ala. State Bank v. Barnes*, 82 Ala. 619; s. c. 87 Ala. 170; *Burns v. Campbell*, 71 Ala. 288; *Paden v. Bellinger*, 87 Ala. 576; *Windham v. Steverson*, 156 Ala. 345; *C. & C. G. Co. v. M. & L.*, 121 Ala. 87; *Purcell v. Mather*, 35 Ala. 570; *Skipper v. Stokes*, 42 Ala. 255; *Shackelford v. Keyser*, 131 Ala. 227. An agreement to assign a debt or chose in action at some future time will not operate as an assignment thereof so as to vest

[*Stegall-Cheairs F. Co. v. Bethune Mule Co. et al.*]

any present interest in the assignee.—2 Dec. Dig. sec. 73; 4 Cyc. 39, and authorities *supra*. The attempted assignment of part of the claim was void both in law and in equity when done without the consent of the debtor.—*Andrews v. Frierson*, 134 Ala. 626; *Hanchey v. Hurley*, 129 Ala. 307; *R. R. Co. v. Robertson*, 109 Ala. 296.

DE GRAFFENRIED, J.—The reporter will set out, in his report of this case, Exhibit C to the bill of complaint.

1. The equity of the complainant's bill cannot be supported unless the Steagall-Cheairs Fertilizer Company possesses an equitable lien upon one-half of the proceeds of fertilizers which were sold by said company and Robert Newman to the Bethune Mule Company under the above contract. We gather from the allegations of the bill of complaint that said fertilizer company and Robert Newman sold, as it was ordered by the Bethune Mule Company, fertilizers to said mule company, and said fertilizers so purchased by the said mule company were, in the usual course of its business as a merchant, sold, in various amounts, to various and sundry people, some of which was paid for in cash, for some of it notes were given, and some of it was charged by said mule company to its customers as items in their accounts with said mule company. The mule company executed to the fertilizer company notes for the amounts which it owed the fertilizer company for fertilizers so purchased and sold; but it did not deliver to the fertilizer company any cash, notes, accounts, or other proceeds received by it for the fertilizers sold by it to its customers. The bill fails to allege that the fertilizer company ever made any demand upon said mule company for such "cash, notes, accounts, or other proceeds."

[*Stegall-Cheairs F. Co. v. Bethune Mule Co. et al.*]

Adults should be allowed great freedom in making their contracts; but we are of the opinion that the fertilizer company does not possess a lien in equity upon the proceeds of the said fertilizer purchased by the mule company under said contract and sold by it to its customers.

In equity the term "lien" is used to denote a charge or incumbrance on a thing, where there is neither a *jus in re* nor *jus ad rem*, nor possession of the thing.—*Donald & Co. v. Hewitt*, 33 Ala. 534, 73 Am. Dec. 431.

The above definition is indeed broad, but it is not broad enough to cover the situation in this case. When the above contract was made, there was no fertilizer in the possession of the mule company which it had bought from the fertilizer company. When the fertilizer was bought by the mule company from the fertilizer company, the fertilizer was the mule company's fertilizer, and, with the knowledge of the fertilizer company, that fertilizer was bought by the mule company to sell to its various customers as a merchant. The mule company was certainly not the agent of the fertilizer company in the matter.—*Jackson v. State*, 2 Ala. App. 226, 57 South. 110.

It cannot be contended that the fertilizer company possessed a lien upon the fertilizer before it was sold by the mule company. The fertilizer, under the express letter of the contract, was, upon its delivery to the mule company, the absolute property of the mule company; and how we can be expected to declare, in favor of the complainant, a lien upon the proceeds of the fertilizer when it did not possess a lien upon the fertilizer at the time it was sold, before it was sold, or at any other time, we are unable to understand. There was no charge or incumbrance on the thing—i. e., the fertilizer before it was sold—and, this being true, there cannot be a charge

[Stegall-Chenirs F. Co. v. Bethune Mule Co. et al.]

or incumbrance upon the proceeds. The proceeds simply stand in place of the fertilizer; and as the fertilizer, as between the fertilizer company and the mule company, was the absolute property of the mule company, so must the proceeds of the sale of the fertilizer be the absolute property of the mule company. When, as we have said, the mule company came into the possession of the fertilizer, it was within the contemplation of the parties that the mule company would sell the fertilizer to its various customers, nevertheless the question as to whether the fertilizer would be sold depended entirely upon the future. The proceeds of the sale of fertilizers were not in the hands of the mule company—the proceeds were not in existence—when the contract was made; and the contract discloses that, at that time, the fertilizer which the mule company was to sell was not then, or may not then have been, in existence.

It seems to us that this case falls clearly within the doctrine announced in *Shackelford v. Kiser Co.*, 131 Ala 224, 31 South. 77. Were we to hold otherwise we would be confronted with the most anomalous situation. It would be possible, if the contention of the complainant is correct, for a merchant to own, absolutely, a large stock of goods, wares, and merchandise and yet, under contracts similar to the one now under consideration, a merchant in New York might have a lien upon the proceeds of all the shoes sold by him, a merchant in New Orleans might have a lien upon the proceeds of all the hats sold by him, a merchant in Chicago might have a lien upon the proceeds of all the gloves sold by him, and so on, ad infinitum. Such a situation could not, of course, exist in any community governed by enlightened laws. We do not deem it necessary to pursue this discussion further.

[Tyson, et al. v. South. C. O. Co., et al.]

The decree of the court below is affirmed.
Affirmed.

DOWDELL, C. J., and ANDERSON and MAYFIELD, JJ.,
concur.

Tyson, et al. v. South. C. O. Co., et al.

Creditor's Bill.

(Decided February 14, 1913. 61 South. 278.)

1. *Fraudulent Conveyance; Grounds; Want of Consideration.*—A conveyance by an insolvent debtor to his wife on a simulated consideration is voluntary and void as against existing creditors, whether mala fide or not.

2. *Same.*—Inadequacy of price alone may constitute fraud when so gross as to shock the conscience.

3. *Same; Bill; Sufficiency.*—A bill by existing creditors alleging that while insolvent respondent conveyed to his wife for a simulated or fictitious consideration, real estate of a value greatly in excess of the consideration expressed, leaving practically no property in respondent out of which complainant's indebtedness could be satisfied and that the wife accepted the conveyance to hinder and defraud complainants, as to whom it was fraudulent and void, and that such a conveyance constituted a preference, and was a general assignment of defendant's property, was open to the demurrer to so much of the bill as charged fraud mala fide, but was good as against the other demurrers.

APPEAL from Lowndes Chancery Court.

Heard before Hon. L. D. GARDNER.

Creditors' bill by the Southern Cotton Oil Company and others against J. A. Tyson and wife. From a decree overruling their demurrers, respondents appeal. Affirmed in part, and reversed and remanded.

Bill by the Southern Cotton Oil Company and others, on behalf of themselves and such other creditors as may desire to join, against J. A. Tyson and Bessie Tyson to declare a deed void, and to subject the lands therein

[Tyson, et al. v. South. C. O. Co., et al.]

conveyed to the satisfaction of the debts. The bill alleges an indebtedness of J. A. Tyson to the Southern Cotton Oil Company in the sum of \$2,038.80, evidenced by three promissory notes, due, respectively, October 15, November 1, and November 15, 1908, with provision for reasonable attorney's fee, with waiver of exemption as to personal property, and that there is still due on the notes the sum of \$1,305, besides the attorney's fee for collecting the same. The second paragraph alleges an indebtedness of J. A. Tyson to Goodall-Brown & Co. The third paragraph alleges that on February 3, 1908, J. A. Tyson and wife executed to the Union Bank & Trust Company a mortgage to secure a recited indebtedness of \$8,640, which was to become due and payable on the 15th day of November, 1908, conveying to said Bank & Trust Company all of the crops of every description to be raised that year and in succeeding years, until the debt was paid, certain real estate which is described, and which is stated not to contain the homestead on which he then resided, and also conveying 18 mules and 1 horse. The fourth paragraph alleges that "on, to wit, the 5th day of September, 1908, the said J. A. Tyson executed and delivered to his wife, Mrs. Bessie B. Tyson, a deed of conveyance to the following described real estate [here follows a description by government subdivision, and also by boundaries], upon the expressed consideration in said deed of \$4,000 and the assumption by the said Bessie B. Tyson of a mortgage which had been executed by said J. A. Tyson on part of the property described in said deed to the Union Bank & Trust Company," as previously alleged in the bill. Complainant alleges that the said Mrs. Bessie B. Tyson did not pay to her husband the said sum of \$4,000, as is recited in said deed, and that there was no valid assumption on her part of the indebtedness se-

[Tyson, et al. v. South. C. O. Co., et al.]

cured by the mortgage executed to said Union Bank & Trust Company; and they further allege that the consideration for said deed was simulated; that the value of the land conveyed therein was greatly in excess of \$4,000 and the amount due and owing at that time by the said J. A. Tyson to the Union Bank & Trust Company under the mortgage referred to; that at the time of the execution of the same the said Tyson was indebted to said complainant in the sum above set forth, and complainant alleges upon information that the said Tyson was also indebted in large sums to other parties, the amounts and names of which are unknown to plaintiffs, and that outside of the property conveyed in said deed to Mrs. Tyson said J. A. Tyson was insolvent; that he owned no other real estate, and that most, if not all, of his personal property was covered by the mortgage hereinbefore mentioned; and that by execution of the mortgage and deed to the bank and to his wife the said J. A. Tyson had left practically no property out of which the indebtedness due these complainants and the other creditors of said Tyson could be satisfied. Complainants therefore allege and charge that the deed of conveyance by said Tyson to his wife was executed by him, he being the owner of said real estate at the time, and was accepted by the said Mrs. Bessie B. Tyson, for the purpose of hindering, delaying, or defrauding these complainants and the other creditors of said Tyson, and that said deed was fraudulent and void as to complainants and the other creditors of said Tyson, and that said deed was fraudulent and void as to complainant. But if complainants are mistaken in their allegation that said deed of conveyance was executed by the grantor and accepted by the grantee for the purpose of hindering, delaying, or defrauding complainants and the other creditors of said J. A. Tyson, and that the deed

[Tyson, et al. v. South. C. O. Co., et al.]

was therefore fraudulent and void as to them, then complainants allege and charge that in and by the execution and delivery of said deed the said J. A. Tyson conveyed to Bessie B. Tyson substantially all of the property owned by him, which was at the time subject to execution, and that in and by the execution of said deed a preference or priority of payment of the indebtedness due and owing to the said Bank & Trust Company was given over the remaining creditors of said Tyson, and that said deed was and is a general assignment by the said J. A. Tyson of his property, and that same should inure to the benefit of all the creditors, and that the said Bessie B. Tyson should be a trustee of the property, etc., and made to account for the rents and profits, etc., of the property, and that the property should be sold for the benefit of the creditors. The prayer is for an accounting to ascertain the amount due the various creditors, and that the deed executed by Tyson to his wife be declared fraudulent and void, and the property be condemned to be sold, and for general relief.

Mr. and Mrs. Tyson demurred, on the grounds that the bill was without equity; that it showed on its face that Mrs. Tyson purchased in good faith; that it fails to show that Mrs. Tyson purchased in bad faith, with notice of the insolvency of the said J. A. Tyson, and that the bill shows a valid assumption by Mrs. Tyson to the Union Bank & Trust Company of their mortgage, and that the bona fides of this transaction is not assailed; that the relation of debtor and creditor does not exist between Mr. and Mrs. Tyson; and that no ground is shown for declaring the sale a general assignment. The Bank & Trust Company answered, which is not necessary to be here set out.

[Tyson, et al. v. South. C. O. Co., et al.]

Complainant, after the decrees on the original demurrer, amended by striking from the fourth paragraph of the bill all its allegations relative to the deed being a general assignment for the benefit of creditors. The respondents, Mr. and Mrs. Tyson, refiled the same demurrers with additional demurrers to so much of the bill as seeks relief upon the ground that the deed from Tyson to his wife was made upon a grossly inadequate consideration; that it was not shown that Mrs. Tyson had knowledge or notice of the insolvency of J. A. Tyson, or of any knowledge or notice of the fraudulent intent of Tyson in making said sale, and that there is nothing alleged to show that Mrs. Tyson was not a bona fide purchaser, for value, of said land; and that the bill shows a valid assumption by her of the debt due to the Union Bank & Trust Company, thereby rendering her liable for said debts, and making her a purchaser of said lands for a valuable consideration.

From a decree overruling these demurrers, respondents J. A. and Bessie Tyson appeal.

JOHN R. TYSON, for appellant. The averment that there was no valid assumption of the indebtedness to the bank on the part of Mrs. Tyson is but a mere conclusion of the pleader, and is not confessed by the demurrer. So also is the averment that the deed was executed by J. A. Tyson, and accepted by his wife for the purpose of hindering delaying or defrauding the creditors.—*Tyson v. Austil*, 168 Ala. 525; *McCreery v. Berney Nat. Bank*, 116 Ala. 224; *Loucheim v. First Nat. Bank*, 98 Ala. 521; *Ft. Payne Co. v. Ft. Payne Co.*, 96 Ala. 472. The assumption of the debt to the bank rendered Mrs. Tyson liable to the bank for it.—*Dimmick v. Register*, 92 Ala. 458; *Tyson v. Austil*, *supra*. The general averment that the consideration is simulated is shown not to be true by the particular facts subsequently alleged.

[Tyson, et al. v. South. C. O. Co., et al.]

—*Johnson v. B. R. L. & P. Co.*, 149 Ala. 529; 59 Am. Dec. 418; 4 Enc. P. & P. 742. Being a purchaser the conveyance to her cannot be assailed unless it be shown and averred that she had notice of the insolvency of the husband.—*Little v. Stern*, 125 Ala. 609.

STEINER, CRUM & WEIL, and POWELL & HAMILTON, for appellee. The bill contains sufficient specific allegations of fraud, and was good against the demurrers interposed.—*Burford v. Steele*, 80 Ala. 150; *Rice v. Eisman*, 122 Ala. 343; *Miller v. Lehman-Durr Co.*, 87 Ala. 517; *Bell & Costen v. Lehman Durr Co.*, 110 Ala. 446; *Cartwright v. Bamburgh, Bloom & Co.*, 90 Ala. 405; *McLarin v. Anderson*, 104 Ala. 202; *Klein v. Miller*, 97 Ala. 507; *Lamar & Rankin D. Co. v. Jones, et al.*, 155 Ala. 474; *Weingarten v. Marcus*, 121 Ala. 187.

ANDERSON, J.—The bill charges that the entire consideration of the deed from Tyson to his wife was simulated—that is, that the recited consideration of \$4,000 was simulated—and that there was no valid assumption of the bank mortgage. If this averment is true, then the conveyance was voluntary and inoperative as against existing creditors, whether fraudulent mala fide or not. If the averment that there was no valid assumption of the mortgage debt was the conclusion of the pleader, the point was not taken by any of the grounds of demurrer. It is also true that the deed recites the assumption of the mortgage debt by the grantee, and as to whether this can be disproved we are not concerned, in passing on the demurrers to the bill, as said bill does aver that there was no valid assumption of the mortgage debt.

While the bill may charge that the conveyance was without consideration, it seems to guard against a failure to prove this averment by attempting to charge

[Tyson, et al. v. South. C. O. Co., et al.]

that the consideration was inadequate, and charges fraud mala fide by way of a general conclusion, as it avers that the land was worth a great deal more than the amount of the bank mortgage and the consideration expressed in the deed combined, and that the deed was accepted by Mrs. Tyson for the purpose of hindering, delaying, or defrauding the creditors of the grantors. Inadequacy of price alone may constitute fraud, when so gross as to shock the conscience; but no such inadequacy is charged in the present case. "In charging fraud the rule is that mere conclusions, as that a conveyance is fraudulent, or that it was made with fraudulent intent, will not suffice against a proper demurrer."—*Little v. Sterne*, 125 Ala. 609, 27 South. 972. Notwithstanding complainant is an existing creditor, if Mrs. Tyson was a purchaser for value, though the consideration was inadequate, she would be protected, unless the consideration was so grossly inadequate as to constitute fraud in and of itself, or unless she had knowledge, actual or constructive, that the grantor was insolvent or in failing circumstances, or unless she had knowledge of and participated in a scheme on his part to hinder, delay or defraud his creditors.—*Little's Case, supra*, and cases there cited. The bill, in so far as it attempts to charge fraud mala fide, does not contain these necessary averments, and was subject to the respondents' demurrers directed at this feature of said bill, and which were not directed at the whole bill.

The demurrers as filed to the entire bill as amended were properly overruled, but those filed to so much of the bill as charged fraud mala fide should have been sustained.

Affirmed in part, and reversed and remanded.

DOWDELL, C. J., and MAYFIELD and DE GRAFFENRIED, JJ., concur.

[Presnall v. Burgess & Co.]

Presnall v. Burgess & Co.***Bill for an Accounting, and to Restrain Foreclosure of Mortgage.***

(Decided April 23, 1913. 61 South. 804.)

1. *Mortgages; Foreclosure; Redemption; Bill.*—Where the bill alleged the execution of certain mortgages which the mortgagees were proceeding to foreclose, the bill possessed equity as a bill to redeem where it charged that one of the mortgages was intended as additional security for the sum furnished by the mortgagee to effect a transfer of the other mortgage, all of which were for the same debt, and that the mortgagees claimed a sum as secured by the mortgage largely in excess of that which was justly due, and were endeavoring to force payment of debts not embraced in or secured by the mortgage, that the property was many times more valuable than the secured indebtedness, that the secured indebtedness was much less than the amount claimed by the mortgagee, and that the mortgagor was ready and willing to pay whatever was justly due.

2. *Same.*—Where the bill to redeem did not show that the entire amount secured by the mortgage had been paid or tendered, the pendency of the suit to redeem did not suspend the power of sale vested in the mortgagee by the mortgage, his successors or assigns, although the bill offers to do equity by paying the ascertained amount secured by the mortgage.

3. *Same; Power of Sale.*—The power of sale in a mortgage is a power coupled with an interest which cannot be suspended or revoked at the will of the mortgagor without the consent of the person secured.

4. *Same; Sale.*—Where the amount secured by certain mortgages had not been fully satisfied or full tender made, a proper sale under the power passed the unqualified title, though made after the filing of the bill to redeem.

5. *Same; Indebtedness; Adjustment; Vacation.*—Where prior to the foreclosure the mortgagor in writing admitted that he was indebted in the sum of \$1,750.28, with interest from January 21, 1908, on a certain mortgage and in consideration of an extension to October 1, following, he promised to take up the mortgage on that date in full, such an admission constituted an adjustment of the account, and would not be set aside or reopened except for fraud or mistake.

6. *Homestead; Mortgage; Execution Before Marriage.*—Where an unmarried debtor executed a mortgage upon land, he is not entitled to claim homestead exemptions in the land, notwithstanding the mortgagor married before the foreclosure.

APPEAL from Clarke Chancery Court.**Heard before Hon. THOMAS H. SMITH.**

[Presnall v. Burgess & Co.]

Bill by C. W. Presnall against D. R. Burgess & Company, and the individuals composing the firm, for an accounting and to restrain the foreclosure of certain mortgages. Decree for respondents and complainant appeals. Affirmed.

WILLIAM D. DUNN, for appellant. The mortgage exhibit C provided that it was to secure this note, and any other amount owed in 1899, and is broad enough to cover every character of indebtedness accruing that year.—*Collier v. White*, 97 Ala. 615. But the chancellor overlooked an important fact in failing to observe that the notes were signed by the husband alone, and although there may be an equitable mortgage on the land other than the homestead, they cannot be held of legal operation as a conveyance to the homestead.—*Butts v. Broughton*, 72 Ala. 294; *Henderson v. Kirkland*, 127 Ala. 185; 115 Ala. 563; 137 Ala. 199. Burgess was not competent to testify as to the custom among commission merchants.—6 Enc. of Evidence.

GREGORY L. & H. T. SMITH, and R. H. SMITH, for appellee. Presnall was not entitled to an accounting.—*Walker v. Driver*, 7 Ala. 679; *Langdon v. Roon*, 6 Ala. 518; *Security L. Assn. v. Lake*, 69 Ala. 456; *Kilpatrick v. Henson*, 81 Ala. 464; 2 Mayf. 19; 3 Mayf. 199. Equity will not inquire into accounts after a settlement.—*Sloan v. Guice*, 77 Ala. 394; *Kilpatrick v. Henson*, *supra*; *Ga. H. I. Co. v. Warten*, 113 Ala. 479. Equity will set off mutual debt, and where parties have agreed that mutual demands shall satisfy each other, equity will enforce the settlement.—*Renfroe v. Yarbrough*, 144 Ala. 487; *Tate v. Evans*, 54 Ala. 16; *Simmons v. Williams*, 27 Ala. 509; 19 Enc. P. & P. 725. The pendency of the bill for an accounting did not affect the

[Presnall v. Burgess & Co.]

sale or its validity.—43 N. E. 350. The power to sell was part of the security.—Sec. 4896, Code 1907. Such power was not revoked by subsequent acts of the mortgagor without the consent of the party secured.—27 Cyc. 1452. The fact of marriage after the execution of the mortgage did not vest homestead rights in the wife as against the mortgagee.—Sec. 1354, Code 1907; 105 S. W. 255. No homestead rights attached to the surplus fund from the sale of the mortgaged property.—Sec. 4188, Code 1907; *Moses Bros. v. Home B. & L. Assn.*, 100 Ala. 407; *Webber v. Short*, 55 Ala. 311. The bill, therefore, is without equity except as a bill for redemption, and hence, the court properly declined to enjoin the sale.—*Sec. L. Assn. v. Lake, supra*; *Caldwell v. Caldwell*, 166 Ala. 406.

MCCLELLAN, J.—Prior to February 19, 1906, C. W. Presnall (complainant) had executed to E. H. Bixler two mortgages—one to secure a note for \$700 and one for \$800. Real and personal property was covered by them; the real property being that here involved. On that date by agreement with Presnall, upon the payment of \$1,500 to Bixler, Burgess & Co., had those mortgages transferred to them. On that date (though acknowledged the next day) Presnall executed a mortgage for \$1,500 to Burgess & Co. In this instrument it is recited in referring to the note due November 1, 1906, it was given to secure: "For the sum of \$1,500.00, advanced and delivered to me in supplies of provisions, cash, material, etc., to enable me to make a crop of cotton," etc. Further on it is also recited therein: "The fee-simple title to the said described property" and the said paragraph should read as follows: "The fee-simple title to said described property is vested absolutely in me and I hereby warrant that there is no prior mort-

[Presnall v. Burgess & Co.]

gage, nor prior lien, nor any incumbrance of any kind or description, upon said property, except to E. H. Bixler, which I expect to have transferred to the said D. R. Burgess & Co. Said advances are made to me by said D. R. Burgess & Co., upon the faith and credit of this warranty." It is also provided in this mortgage to Burgess & Co. that it should secure the payment of advances of supplies and money made "during the present year" (1906) in excess of the amount of the \$1,500 note. It is also provided in that mortgage that the mortgagee might purchase at the foreclosure sale therein above described. At the time these transactions took place, as well as when the Bixler mortgages were executed, Presnall was unmarried. During the winter of 1904-05 Presnall became indebted to Burgess & Co. in the sum of \$264.81. This indebtedness existed when the mentioned mortgages were transferred, and when the \$1,500 mortgage to the company was executed. On March 26, 1907, Presnall was married.

In the process of foreclosing the two Bixler mortgages, of which they were the transferees, and the \$1,500 mortgage executed to them by Presnall, Burgess & Co. gave notice that sales for that purpose would be had on March 22, 1909. On March 12, 1909, the original bill in this cause was filed by Presnall against the firm of Burgess & Co. It exhibited therewith in copy the three mortgages mentioned and the notice of their foreclosure under the power of sale in each provided. The more material averments are these: That the transfer of the Bixler mortgages as described was effected by agreement of the complainant and respondents and Bixler; that respondents honored complainant's draft, for the \$1,500, consideration of the transfer; that complainant executed to respondents the mortgage of February 19, 1906, which was intended as additional security for

[Presnall v. Burgess & Co.]

the sum furnished by the defendants to effect the transfer of the Bixler mortgages; that all three of the mortgages were for the same debt; that the only other sum or value advanced or received by complainant from respondents during the year 1906 was \$25 (which, as we have indicated before, was secured by the clear provision of the mortgage made to respondents on February 19, 1906); that the respondents claim a large sum due them upon the debt or debts secured by these mortgages, but that this claim is excessive, and is largely not justly due; that respondents are endeavoring to enforce the payment of debts not embraced in the debt for which the mortgages were given as security; that the mortgage debt or debts was or were not to bear interest until maturity, notwithstanding which interest was computed and claimed upon the note of February 19, 1906, as appears from a statement of account presented to complainant by the firm on February 14, 1907; that the property described in the mortgages was many times as valuable as the true indebtedness; and that complainant does not know the true amount due upon the mortgages, but that it is greatly less than the amount claimed by respondents. The bill also contains the following: "And your orator further sheweth unto your honor that he is ready and willing to pay whatever amount may be found due, as may be directed by this honorable court, and he therefore submits himself to the jurisdiction of this honorable court."

The special prayer is for an accounting to ascertain the indebtedness between the parties, and that upon payment of complainant the mortgages be surrendered and canceled. It was also prayed that a temporary injunction issue restraining the foreclosure of the mortgages, and upon final hearing that the injunction be made permanent. There is a prayer for general relief.

[Presnall v. Burgess & Co.]

The injunction prayed was not issued; the bond exacted not having been made by complainant. At the foreclosure sale the property was sold for \$1,973.72—the amount of the indebtedness, including cost, attorney's fee, and interest claimed by respondents. The respondents answered, and constituted the sixth paragraph thereof the substance of their cross-bill. The following letter, signed by complainant on February 14, 1908, is set forth in the paragraph: "I am due you \$1,750.28 with interest from Jan. 21, 1908, on my mortgage dated Feby. 19, 1906, recorded in Clarke county 6th day of March, 1906. Now, in consideration of the fact that you are willing to extend this mortgage for me with interest to October 1, 1908, I hereby agree and promise to take up said mortgage in full on 1st of October, 1908."

It is alleged that on the occasion of the signing of the letter the respondents rendered complainant a statement of his account to that date, to the correctness of which he agreed, wherein the net indebtedness stated in that letter was shown as the result from itemized debits and credits. It is also averred in this paragraph: "Under the facts aforesaid, the defendant is advised and claims that the balance of the proceeds of the sale of said mortgage property over and above the indebtedness secured, according to the terms of the mortgage, as written upon the face thereof, and the costs and expenses of the sale, and the said tax which the defendant had a right to pay to protect his interest in said mortgage and the rights of subrogation thereto was by said agreement of the defendant authorized to be deducted from the proceeds of said sale, and that there was out of said proceeds only the sum of \$3.65 which the defendant did not have the right, either by the terms of said mortgage, the right of subrogation or said agreement to de-

[Presnall v. Burgess & Co.]

duct from the proceeds of said mortgage, but, if mistaken in this, he still here claims that complainant is indebted to him in a sum equal to the difference between the amount secured by said mortgage and said entire indebtedness, and he hereby claims the right to offset such indebtedness against any balance of the proceeds of the sale of said property for which he would otherwise be liable to the defendant." The answer to the cross-bill, while wholly failing to impute to respondents or either of them any degree of fraud in inducing the signature of the letter of February 14, 1908, denied the correctness of the amount of the net indebtedness therein stated.

Subsequently, on August 29, 1910, the original bill was amended by the addition thereto of paragraph 9, which reads: "Complainant respectfully shows unto your honor that he has lived upon and occupied as his homestead for practically all of his life the land described in Exhibit C to the bill of complaint filed in this cause. That he was married on March 26, 1907, and he and his wife have resided upon and occupied as their homestead said land ever since their marriage. He has resided upon and occupied as his homestead, and will claim as exempt to him as such homestead, all the land described in said Exhibit C as being in section 10. T. 8 R. 4, E.; also the S. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ and $12\frac{1}{2}$ acres, the exact description of which he is not able to give at this time, but which is in the south part of the N. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of section 11, T. 8, R. 4, E., in Clarke county, Ala." The following admission, signed by the solicitors for respondents, was filed in the cause August 31, 1910: "Defendants agree that on the trial of the above-entitled cause they will admit that C. W. Presnall lived with his wife on the land described in the bill of complainant on February 14, 1908; that

[Presnall v. Burgess & Co.]

the said C. W. Presnall also lived on it at the time he executed the mortgage to E. H. Bixler, which is marked Exhibit A in the bill of complaint, and continued to live upon it until the time of his marriage; that it was the homestead of the said C. W. Presnall on February 14, 1908."

After restating in the answer to the amended bill the substance of the admission quoted, it is averred in this answer: "But defendants deny that the complainant has any homestead rights in this land, and deny that complainant has any right to claim said lands or any part thereof as exempt to him. The respondents pray that this answer may be taken as an amendment of its answer and cross-bill heretofore filed in this cause, and be made a part of their cross-bill."

That the original bill possessed equity as a bill to redeem is clear we think; and, under this theory, the ascertainment of the true amount of the indebtedness was an essential element of the relief the bill so sought.—2 Jones on Mort. § 1094; 17 Ency. Pl. & Pr. p. 964; *Smith v. Conner*, 65 Ala. 371; *Higman v. Humes*, 133 Ala. 617, 32 South. 574. But while the bill was pending the foreclosure sale under the power was effected; the temporary writ of injunction, to restrain that action pendente lite, not having issued because of the failure of the complainant to make the bond prescribed in the fiat.

Where the bill does not show that the entire amount for which the mortgage affords security has been paid or tendered, the pendency of the cause to redeem will not suspend the right to exercise the power of sale vested by the mortgage in the mortgagee, his successors or assigns, notwithstanding the bill offers to do equity by satisfying the ascertained sum secured by the mortgage.—2 Jones on Mort. § 1906, pp. 863, 864; *Stevens v.*

[Presnall v. Burgess & Co.]

Shannahan, 160 Ill. 330, 43 N. E. 350; *Ryan v. Newcomb*, 125 Ill. 91, 16 N. E. 878. The rule is different in Massachusetts where statutes control the matter.—*Way v. Mullett*, 143 Mass. 49, 8 N. E. 887; *Clark v. Griffin*, 148 Mass. 540, 20 N. E. 169.

The power of sale in a mortgage is a power coupled with an interest—that cannot be revoked or suspended at the will of the mortgagor without the consent of the party secured.—*Bergen v. Bennett*, 1 Caines, Cas. (N. Y.) 1, 2 Am. Dec. 281; Code, § 4896; 27 Cyc. pp. 1452, 1453; *Tarrer v. Haines*, 55 Ala. 503; 2 Perry on Trusts, 602h.

The foreclosure under the power of sale of the mortgages confessedly not wholly satisfied, and full tender not having been made to that end, was valid, passing the unqualified title, though effected after the bill to redeem was filed. These mortgages were executed by the complainant before his marriage; and hence bore the full security the land afforded, free from the charge or claim of homestead exemptions. The subsequent marriage of complainant could not impair that security in value or character in any degree.—*McGill v. Hughes*, 84 Ark. 238, 105 S. W. 255.

The letter of February 14, 1908; was an unequivocal admission, not only of an indebtedness secured by the mortgage, but of a specified amount; and upon the faith of that adjustment forbearance was accorded him by the respondents. There is no impeachment of the binding quality of this adjustment of the account between the parties. No vitiating fraud or mistake is shown by the preponderance of the evidence, if it had been sufficiently averred in the pleading. Such an adjustment will not be reopened except for fraud or mistake.—*Ga. Home Ins. Co. v. Warten*, 113 Ala. 479, 22 South. 288, 58 Am. St. Rep. 129; *Sloan v. Guice*, 77 Ala.

[Spink v. Guarantee B. & T. Co.]

394; *Kilpatrick v. Henson*, 81 Ala. 464, 1 South. 188. If the sum stated in the letter expressing the adjustment of the mortgage debt and reciting the extension of the time for payment of the mortgage debt was erroneous as the result of the misapplication of payments to items of indebtedness to which, if unagreed to, the law would not have applied them, the correction could not be made without impeaching the adjustment; and this neither the pleadings nor the evidence will allow on the record here.

The amount for which the property was sold at the foreclosure sale was the sum agreed to in the letter of February 14, 1908, with interest and costs incurred in effecting the power of sale in the mortgages.

Pretermittting consideration of the equitable set-off in the cross-bill, we see no ground on which to base a finding of error in the decree appealed from. It is affirmed.

Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

Spink v. Guarantee B. & T. Co.

Bill to Declare Deed Void and to Remove it as Cloud on Title.

(Decided February 6, 1913. 61 South. 302.)

1. *Deeds; Attestation; Notary's Acknowledgment.*—Where the execution of a deed was proven by a notary, his certification of acknowledgment is properly allowed to stand as an attestation by him as a witness.

2. *Acknowledgment; Wife; Separate Examination.*—A wife's separate examination and acknowledgment is necessary only where the title to the homestead is in the husband.

APPEAL from Birmingham City Court.

Heard before Hon. H. A. SHARPE.

[*Spink v. Guarantee B. & T. Co.*]

Bill by Margaret H. Spink against the Guarantee Bank & Trust Company to declare a deed void and remove it as a cloud upon title. Decree for respondent, and complainant appeals. Affirmed.

The facts of the case seem to be that appellant, with her husband, on the 7th day of April, 1910, executed an instrument, purporting to be an absolute conveyance, conveying to appellee an absolute title in the property of appellant described in said conveyance. The instrument was written, and the joint acknowledgment of husband and wife and the separate acknowledgment of the wife was taken before one C. H. Seals, a notary public, who was at the time an officer of and stockholder in said corporation, and the bill attacks the deed for that reason.

R. B. SMYER, for appellant. The only error complained of is the holding of the lower court that the deed was a valid and operative conveyance, both in law and in equity. Public policy forbids the taking and certifying of an acknowledgment by an officer financially interested in the transaction.—*Hayes v. So. B. & L. Assn.*, 26 South. 527; *Monroe v. Arthur*, 28 South. 476; *Chattanooga Co. v. Vaught*, 143 Ala. 389. A grantee or beneficiary in a conveyance is not a competent witness to the conveyance.—*Coleman v. State*, 79 Ala. 49; *Seibold v. Rogers*, 110 Ala. 438; *Brooks v. Cook*, 141 Ala. 499. Hence, the deed was void and conveyed nothing.—Section 3355, 3357, Code 1907.

GARBER & GARBER, for appellee. A separate acknowledgment of the wife is not necessary where the title to the homestead resides in her.—*Monroe v. Arthur*, 126 Ala. 362; *Hayes v. So. B. & L. Assn.*, 124 Ala. 663; *Grider v. Am. Mtg. Co.*, 99 Ala. 281; *N. B. & L. Assn.*

[Spink v. Guarantee B. & T. Co.]

v. Cunningham, 30 South. 335. A defective acknowledgment to a deed or mortgage may operate as an attestation of a subscribing witness.—*Merritt v. Phoenix*, 48 Ala. 90; *Sharp v. Orme*, 61 Ala. 268; *Rogers v. Adams*, 66 Ala. 602; *Torrey v. Forbes*, 94 Ala. 142; *O'Neal v. T. C. I. & R. R. Co.*, 140 Ala. 385. Although an officer and stockholder of the grantee corporation Seals was a competent witness to the deed.—*Maddox v. Wood*, 151 Ala. 157; *Morris v. Bank of Attalla*, 142 Ala. 638; s. c. 153 Ala. 356, and authorities *supra*.

SAYRE, J.—The point taken against the chancellor's decree is that he gave effect to a deed of the homestead which was acknowledged before a notary who was at the time a stockholder and officer of the grantee corporation. There were two acknowledgments, one in the form used in connection with ordinary conveyances, the other in the form required in the case of conveyances of the homestead by the wife. The execution of the instrument was proved by the deposition of the notary, whose certification of the acknowledgment was thus properly allowed to stand for his attestation as a witness.—*N. C. & St. L. Ry. v. Hammond*, 104 Ala. 191, 15 South. 935. As for the separate acknowledgment of the wife, that was not necessary, because the title to the homestead was in her. Under the decisions of this court, the wife's examination and acknowledgment separate and apart from the husband is necessary only when the title is in the husband.—*Weiner v. Sterling*, 61 Ala. 98; *Dawson v. Burrus*, 73 Ala. 111; *Campbell v. Noble*, 145 Ala. 233, 41 South. 745.

There is no error in the record.

Affirmed.

DOWDELL, C. J., and MCCLELLAN and SOMERVILLE, JJ., concur.

[Vandegrift, et al. v. Shortridge.]

Vandegrift, et al. v. Shortridge.

Bill to Quiet Title.

(Decided April 17, 1913. Rehearing denied May 8, 1913.
61 South. 897.)

1. *Quieting Title; Admissions of Answer; Proof.*—Where the bill to quiet title alleged that complainants are in the peaceable possession of, and owned, the land, an answer merely denying that complainants are owners of the land admits the peaceable possession of the complainant; and where the evidence, aside from the admission, establishes peaceable possession in complainants, respondents must show title superior to complainants' right of possession to defeat a decree for complainant.

2. *Same; Decree; Transfer of Title.*—A decree quieting title of land in an heir as against the grantee of the heir's ancestor, rendered in a suit against such grantee, does not have the effect to transfer title to the heir, but estops the grantee of the ancestor from asserting title as against such heir.

3. *Deeds; Construction; Qualifying Terms.*—The deed examined and held to convey an undivided half interest in the single track in section 30, the phrase undivided half, qualifying only that track and not the other lands described by government survey.

4. *Same; Favorable to Grantee.*—Where a deed is fairly doubtful it will be construed most strongly against the grantor and in favor of the grantee.

APPEAL from Jefferson Chancery Court.

Heard before Hon. A. H. BENNERS.

Bill by Annie Vandegrift and another, against W. W. Shortridge to quiet title to land. From a decree for respondents complainants appeal. Reversed and rendered.

W. H. SMITH, and JOSEPH T. COLLINS, JR., for appellant. Appellant was not required to have title by possession, but merely actual, peaceable possession.—*Newell v. Manley*, 173 Ala. 205. This was shown not only by the admission in the answer, but by the evidence independent thereof, which placed upon appellee the bur-

[Vandegrift, et al. v. Shortridge.]

den of showing title in himself, or a lien or encumbrance on the land.—115 Ala. 582; 128 Ala. 579; 137 Ala. 298. Such possession under color of title will defeat any claim except an actual conveyance from one in prior possession.—158 Ala. 91; 167 Ala. 615; 169 Ala. 433. A person holding peaceably may show that the person suing him had been divested of his title.—Authorities supra; *Wood L. Co. v. Williams*, 157 Ala. 73. The court will presume foreclosure of the mortgage under which Vandegrift holds.—57 Ala. 108; 73 Ala. 105; 128 Ala. 198; 129 Ala. 531. The deed of Shortridge should be construed most strongly against him.—Devlin on Deeds, secs. 8, 140, 848; 166 Ala. 312.

L. J. HALEY, JR., for appellee. The presumption is that a mortgage twenty years past due has been paid. The decree of the court in the *Southern M. L. Co. Case* divested whatever title the land company had, and vested it in Shortridge. The older title gives possession.—*Reddick v. Long*, 124 Ala. 267; *Strange v. King*, 84 Ala. 212; *Mills v. Clayton*, 73 Ala. 359; *Anderson v. Miller*, 56 Ala. 621.

SOMERVILLE, J.—Appellants filed their bill to quiet title to certain lands. The second paragraph of the bill avers that “complainants are in the peaceable possession of, and own,” the lands in suit. In answering this specific paragraph respondents merely “denies that the complainants are the owners of the land described,” excepting one 40 as to which he disclaimed.

This must be taken as an admission of the truth of the averment of the bill as to complainants’ peaceable possession, since this fact was prima facie within the knowledge, information, or belief of respondent.—*Agnew v. McGill*, 96 Ala. 496. 500, 11 South. 537;

[Vandegrift, et al. v. Shortridge.]

Holmes v. State, 100 Ala. 291, 14 South. 51; *Alexander v. Rea*, 50 Ala. 450; *Clark v. Jones*, 41 Ala. 349; *Kirkman v. Vanlier*, 7 Ala. 218. And, indeed, the evidence sufficiently established the fact, independently of the answer's admission.

In this state of the pleading and proof, it was incumbent upon respondent to propound a claim or title superior to complainants' right of possession.—*Adler v. Sullivan*, 115 Ala. 582, 585, 22 South. 87; *Brand v. U. S. Car Co.*, 128 Ala. 579, 30 South. 60. In this respondent completely failed, and on the undisputed evidence complainants were entitled to a decree quieting their title as against any claim of respondents.

Unaided by any brief for respondent (appellee), we infer from the evidence adduced in his behalf that his claim of title rests upon the former ownership of his father who acquired the lands from the government, and the theory that title never passed from him by the deed he executed to the Southern Mineral Land Company in 1858; or else upon the notion that decree rendered in respondent's favor in April, 1910, quieting his title to these lands as against said land company, re-invested him with the title originally held by his said father.

In the deed from the elder Shortridge to the land company, the granting clause conveys a number of tracts described by the government numbers, and then proceeds: "Also the undivided half of the N. E. 4 of the S. W. 4 of section 30. township 21, range 3 west; and * * * and * * *; and the S. W. 4 of the S. W. 4 of section 31, township 21, range 4 west, etc. (including the lands in suit)." The contention seems to be that the phrase "undivided half" qualifies not only the tract immediately described, but also all the succeeding descriptions.

[Vandegrift, et al. v. Shortridge.]

We do not think the deed is reasonably susceptible of that interpretation on the face of the language used, but rather it means to thus qualify the *single tract* to which the limitation is immediately applied. Moreover, even if the meaning were fairly doubtful, the grant would be construed more strongly against the grantor, and in favor of the grantee.—*Chambers v. Ringstaff*, 69 Ala. 140, 146. Unquestionably, the deed completely divested the title of the grantor, respondent's father, and respondent's claim from that source is worthless.

Respondent's decree against the land company did not operate as a transfer of its title to him, and was no more than an estoppel against the further assertion of that title against him. Hence the exhibition of that decree did not show title in respondent. Moreover, even if that theory were sound, it would be fatal to respondent's claim, for these complainants had *several months previously* secured a decree against the land company vesting title in them as against that company, and this decree was in evidence.—*Vandegrift v. So. Min. Land Co.*, 166 Ala. 312, 51 South. 983.

The decree of the chancery court will be reversed, and a decree will be here rendered granting relief to complainants in accordance with the prayer of the bill.

Reversed and rendered. All the Justices concur, except DOWDELL, C. J., not sitting.

[Smith v. Morris, et al.]

Smith v. Morris, et al.*Bill to Enjoin Trespass.*

(Decided February 13, 1913. 61 South. 276.)

1. *Injunction; Trespass; Injury to Realty.*—Where injuries to realty are permanent and continuous, tending to destroy the substance of the inheritance, ruin the estate, or permanently impair its future use or enjoyment, equity will interpose by way of injunction, pecuniary compensation being inadequate in such cases.

2. *Same; Conspiracy; Allegation and Proof.*—Where the bill was filed against several respondents to enjoin continuous acts of trespass and alleged that they were jointly liable therefor because of an unlawful conspiracy among them to injure and impoverish complainant, but the preponderance of the evidence showed that each act was an independent act, and rebutted the idea that there was a conspiracy, the court properly declined to enjoin.

3. *Depositions; Admissibility; Objection; Waiver.*—Where the complainant made no objection to a consideration of depositions taken on behalf of respondents, but introduced as a part of his own evidence testimony given by each respondent on the cross-examination, the court could properly consider the deposition, although they were not certified properly.

APPEAL from Blount Chancery Court.

Heard before Hon. A. H. BENNERS.

Bill by W. L. Smith against H. R. Morris and others, to enjoin continuous trespass to realty. Decree for respondents and complainant appeals. Affirmed.

JAMES KAY, and GEORGE W. DARDEN, for appellant. The circumstances of this case are such as to authorize the court of chancery to intervene, as pecuniary compensation was inadequate, and would have resulted in a multiplicity of suits.—*Hooper v. Dora M. Co.*, 95 Ala. 239; *Chappell v. Roberts*, 140 Ala. 327; *Wilson v. Meyers*, 144 Ala. 402; 22 Cyc. 286, 835, 836. The court improperly considered the depositions as they were not certified as required by law.—Sec. 4040, Code 1907, and authorities there cited.

[Smith v. Morris, et al.]

W. A. WEAVER, and CAMPBELL & JOHNSTON, for appellee. No brief came to the Reporter.

DE GRAFFENRIED, J.—The bill of complaint in this case was filed by the complainant, W. L. Smith, against H. R. Morris, L. A. Kilpatrick, P. W. Sullivan, W. W. Sullivan, Bert Ellison, W. H. Collier, A. A. Herndon, Frank House, James Strong, W. H. Collier & Co., a partnership composed of W. H. Collier and A. A. Herndon, and the Southern Iron & Steel Company, a corporation organized and existing under the laws of the state of New Jersey.

The complainant alleges in his bill of complaint that on or about the 14th day of June, 1910, and for a long time prior thereto, he owned in fee simple and was at that time, and at the time of the filing of the bill of complaint, lawfully possessed of certain lands which are described in the bill of complaint. The bill of complaint further alleges that the respondents and each of them “did on or about the 27th day of February, 1911, and at divers different times between that date and the filing of this bill, wickedly and maliciously conspire together, and with intent to injure and impoverish complainant, trespass upon” the said lands. In other words, the bill of complaint alleges that the respondents were guilty of continuous acts of trespass upon the complainant’s said lands, and that they were jointly responsible therefor because of an unlawful conspiracy on the part of the respondents thereby to injure and impoverish the complainant.

1. The rule is familiar that when injuries to realty are permanent, continuous, and of frequent occurrence, tending to “destroy the substance of the inheritance, or ruin the estate, or permanently impair its future use and enjoyment in the manner in which the owner has

[Smith v. Morris, et al.]

been accustomed to use and enjoy it, pecuniary compensation is inadequate," and a court of equity will interfere and award an injunction to prevent such injuries.—*Hooper v. Dora Coal Mining Co.*, 95 Ala. 235, 10 South. 652.

2. In this case the complainant, to support the theory that the alleged frequent trespasses upon his property were not independent acts of the respondents done by each of them at separate times and while acting independently of the other respondents, in order that he might have the court to treat as continuous acts of trespass by all of the respondents what otherwise would have amounted to an occasional act of trespass by each of them, undertook to attach each single act of trespass to all of the respondents by alleging that each trespass, no matter by which one of the respondents it was actually committed, was committed in pursuance of an agreement entered into by all of the respondents to trespass upon the complainant's land in order that they might injure him in its permanent enjoyment.

There was evidence of independent acts of trespass committed at different times by the respondents or some of them, acting separately from his correspondents upon the lands of the complainant. The preponderance of the evidence in the case, however, rebutted any idea that there was any conspiracy on the part of the respondents to trespass upon said lands or in any way to injure the complainant. Each respondent may at some time have been guilty of an act of trespass upon the complainant's land, but the preponderance of the evidence discloses that "such act of trespass was an independent act of trespass with which his correspondents had no connection. The complainant failed, therefore, to prove one of the material allegations of his bill of complaint—an allegation upon which the entire equity

[Smith v. Morris, et al.]

of his bill depended—and he was therefore not entitled to the relief prayed in his bill.

3. The evidence in this case was taken informally by the parties before a commissioner mutually agreed upon by them. The witnesses were examined orally, and each party appeared at such examination, examined his own witnesses on their direct and rebuttal examinations, and cross-examined the witnesses of his adversary. This cause was, by agreement of the parties, submitted for decree in vacation upon the pleading and the proof as noted by the register. The depositions of the respondents appeared in such note of testimony, and the complainant filed no objection to the consideration by the chancellor, as testimony in the case, of the depositions which had been taken on behalf of the respondents. In fact, the complainant himself introduced in his note of testimony as a part of his evidence the evidence of each witness for respondent given on cross-examination whose deposition he now insists should not have been considered by the chancellor. We are therefore of the opinion that the chancellor under the circumstances shown by this record properly considered the depositions of respondents, although they may not have been certified by the commissioner before whom they were taken in the manner provided by our statutes.

There is no error in the record. The decree of the court below is affirmed.

DOWDELL, C. J., and ANDERSON and MAYFIELD, JJ.,
concur.

[Farrow v. Sturdivant Bank.]

Farrow v. Sturdivant Bank.

*Bill to Require Surrender of a Contract and to Enjoin
a Suit at Law.*

(Decided February 13, 1913. 61 South. 286.)

1. *Quieting Title; Title in Possession.*—The bill examined and held not maintainable as a bill to quiet title, either under the statute or otherwise, complainant not being the present owner or claimant, or in possession.

2. *Estoppel; Inducement to Act.*—The respondent in this case held not to be estopped to sue for the breach of a contract of sale because after the sale he asserted that he was satisfied therewith.

3. *Appeal and Error; Remandment.*—Where a bill was subject to a general demurrer, the appellate court will render a decree sustaining demurrer, and will remand the cause for further action in the lower court.

APPEAL from Tallapoosa Chancery Court.

Heard before Hon. W. W. WHITESIDE.

Bill by the Sturdivant Bank, a partnership, against C. A. Farrow, to require defendant to surrender and deliver up a contract, to cancel the same, and to enjoin defendant from prosecuting his suit in the circuit court of Tallapoosa county, on said contract, and for general relief. From a decree overruling demurrers to the bill, respondent appeals. Reversed, rendered, and remanded.

The bill alleges, in effect, that the complainant bank had a mortgage on certain lots in the town of Dadeville, which are fully described, and on a stock of goods and other property, to secure a certain sum which respondent owed orators, and to secure an additional sum for loans and advances to be made by the bank to respondent, Farrow; that, the indebtedness being past due and unpaid, complainant and respondent made an agreement to purchase the real estate described from the

[Farrow v. Sturdivant Bank.]

respondent for the sum of \$2,500, which was credited to Farrow's indebtedness, and the said Farrow and wife executed a deed to said property to orator; that after the execution of said deed said Farrow expressed a desire of repurchasing the property if he should become able to do so, whereupon orator executed to Farrow a contract, a copy of which is set out, and the effect of which is that if the said Farrow pay to the bank the \$2,500, with interest from date to the time of said payment, the said bank would execute to Farrow a deed to said real estate, conveying the title of same to said Farrow. It is then alleged that nothing has been paid by respondent on said amount of \$2,500, as evidenced by said agreement. That after the execution of the above contract, it was agreed between the same parties that if they could sell the property for a sum greater than \$2,500, then they would pay Farrow whatever difference was realized above \$2,500; it being further agreed that Farrow was to receive a credit of \$2,500 in any event, and that orator was to sell for such sum as he could obtain. That orator was unable to sell the property for more than \$2,500, but after several months, succeeded in selling it at that sum to one J. L. Fuller, and informed the said Farrow to whom the property was sold, and of the fact that he could not obtain more than \$2,500 for it, and that Farrow made no objection, but expressed himself as being satisfied therewith. It is then alleged that Fuller had sold the property to other parties, and they had made valuable improvements thereon, and that while these improvements were being made Farrow knew that the various parties were spending large sums of money thereon, and offered and expressed no objection and no desire to repurchase, and asserted no right or claim to do so under the contract, and had not done so at any time prior to the making of the

[Farrow v. Sturdivant Bank.]

improvements. It is then alleged, in effect, that Farrow approached the complainant and offered to repurchase and demanded the execution of the deed, but made no offer to pay for the improvements that had been placed thereon, and that when complainant declined to execute said deed to Farrow, telling him that he did not then own the property, Farrow brought suit against orator for a breach of the contract.

LACKEY & WATKINS, for appellant. The bill was not maintainable as one to quiet title.—*Ashurst v. McKenzie*, 92 Ala. 484. Equity will not intervene simply to appease complainant's apprehension of future trouble.—*Reeves v. Longstreet*, 54 Ala. 291; *March v. England*, 65 Ala. 275. The bill was subject to general demurrer.—15 Wall. 373; *Merritt v. Ehrman*, 116 Ala. 278; *Calhoun County v. Art Metal Co.*, 152 Ala. 612; *Hickman v. Richberry*, 122 Ala. 638, and authorities supra.

JAMES W. STROTHER, for appellee. The bill contained equity and the court properly overruled demurrers thereto.—*Rea v. Longstreet*, 54 Ala. 291; *Bank v. Pruitt*, 128 Ala. 470; 9 Am. St. Rep. 854; 30 N. J. E. 364; 18 N. J. E. 370.

ANDERSON, J.—The complainant being neither the present owner, nor claimant of the land, nor in the possession of same, actual or constructive, cannot maintain a bill to quiet title under the statute, or otherwise, independent of some other equity.

The equity attempted to be set out in the bill is based upon the idea that the complainant has an equitable defense to the pending action at law, not available in a court of law, and we are unable to conclude, from the averments of the bill, that such is the case. The bill

[Farrow v. Sturdivant Bank.]

attempts to set up an equitable estoppel in pais against the respondent's right to recover for a breach of the agreement to reconvey the land, and if such an estoppel was disclosed, it might not be available as a defense in law, and the bill would probably contain equity; but the bill does not aver that Farrow consented to a sale of the land to Fuller, or any one else, except for a sum greater than \$2,500, and provided the excess was paid over to him, and therefore fails to charge that the said Farrow consented to the sale to Fuller. It may be true that the bill sets out that, after complainant had sold and conveyed the land to Fuller, the respondent informed Farrow of the fact, and he not only made no objection, but expressed himself as being satisfied and promised to surrender to the respondent the agreement to reconvey the land. It also avers that the grantee, Fuller, has made valuable improvements on the land; and, if such was the case, Farrow might be estopped by said ratification from going after Fuller by redeeming the land, but it must be observed that the action at law is for a breach of the agreement by the complainant, and the question is whether or not there exists an equitable estoppel in pais to the said Farrow's right to recover for a breach of the agreement. As above stated, the bill does not charge that Farrow consented to the sale in question, and while he may have acquiesced in same after it was made to Fuller, this complainant did not act upon said acquiescence, or suffer any detriment by virtue of same, as the sale had been made before Farrow acquiesced in same. "It is a general rule of law that if a man, either by words or conduct, has intimated that he assents to an act which has been done, and that he will not offer opposition to it, although it could not have been lawfully done without his consent, and he thereby induces another to do that from which they

[Farrow v. Sturdivant Bank.]

otherwise might have abstained, he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith to his words, or to the fair inference to be drawn from his conduct.' And again, 'If a party has an interest to prevent an act being done, and acquiesces in it, so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had it been by his previous license.' The estoppel resting upon the grantors, being free from all fraud, binds their creditors. One claiming under or through another who is bound by an estoppel is affected and bound by it."—*Goetter v. Norman*, 107 Ala. 585, 19 South. 56; *Fields v. Killion*, 129 Ala. 373, 29 South. 797. It must be observed that the conduct relied upon as an equitable estoppel must have induced the party relying upon same to act, and which is not shown to have been the case by the present bill.

The chancery court erred in not sustaining the respondent's demurrer to the bill for want of equity, and the decree is reversed, and one is here rendered sustaining said demurrer. Under the rule laid down in the case of *Singo v. Brainard*, 173 Ala. 64, 55 South. 603, the case is remanded.

Reversed, rendered, and remanded.

DOWDELL, C. J., and MAYFIELD and DE GRAFFENBRIED, JJ., concur.

[Hanvey v. Gaines.]

Hanvey v. Gaines.*Bill to Enforce Vendor's Lien.*

(Decided April 15, 1913. 61 South. 883.)

1. *Vendor and Purchaser; Lien; Application; Real and Personal Property.*—A vendor's lien is a creature of equity arising upon the conveyance of land to prevent an unconscionable vendee from retaining the land without paying the purchase price, but it has no application to personal property, and does not arise in case of a sale of both real and personal property under a single contract for a gross sum.

2. *Same; Enforcement; Complaint.*—Under a bill alleging the sale of a small parcel of land on which was situated a sawmill, shingle and grist mill, and cotton gin combined which had been operated since 1897, describing the land by metes and bounds, it will be assumed, on demurrer to the bill, that the machinery was so attached as to be a part of the realty, and that hence, the conveyance was solely a conveyance of real property and sufficient to sustain a vendor's lien.

3. *Fixtures; Mill Machinery.*—The mere use of mill machinery in connection with the business of operating a mill does not necessarily so annex the machinery to the realty as to constitute it a fixture, the question depending largely on the intention of the party.

APPEAL from DeKalb Chancery Court.

Heard before Hon. W. H. SIMPSON.

Bill by R. A. Gaines against W. M. Hanvey to fix and enforce a vendor's lien. From a decree overruling demurrers to the bill respondents appeal. Affirmed.

E. O. McCORD, and THOMAS E. ORR, for appellant. The bill was subject to the demurrer interposed, and the court erred in overruling it.—*Suddeth v. Knight*, 14 South. 475, and authorities cited. It appears from the bill that the property therein sought to be fixed with the lien was part personal and part real.—*Parker v. Blount County*, 148 Ala. 275; *Rogers v. Prattville M. Co.*, 81 Ala. 483; *Tillman v. Delacy*, 80 Ala. 103.

HUNT & HUNT, for appellee. Under the bill, and on demurrer thereto, it will be assumed that the property

[Hanvey v. Gaines.]

described was so affixed to the realty as to be a part thereof, and the bill was not subject to the demurrers interposed.—*Rogers v. Prattville M. Co.*, 81 Ala. 483; 2 Devlin on Real Estate, sec. 1192; *Dowling v. McCall*, 124 Ala. 634.

SAYRE, J.—Complainant (appellee) filed his bill to enforce a vendor's lien. It is averred that complainant had in 1910 sold to defendant his mill property, consisting of a small parcel of $1\frac{1}{4}$ acres of land situated in DeKalb county and described in the bill by metes and bounds. The bill proceeds: "On said lands is situated a saw mill, shingle and grist mill and cotton gin combined, which have been operated since 1897, and said lands are otherwise known as the R. A. Gaines mill property." But whether this language is quoted from the conveyance, which is not made a part of the bill, or whether it is intended by the pleader as his own further description of the subject-matter of the conveyance, is not clear. The consideration of the sale is described as "\$1,300 and the conveyance to orator by the said Hanvey of about $3\frac{1}{2}$ acres of land, said \$1,300 to be evidenced" by promissory notes payable at fixed dates in the future. The prayer was that a lien be declared upon "said lands," and that they be sold for the satisfaction of the note then past due. Appellant's objection to the chancellor's decree overruling his demurrer is that there was lack of judicial concurrence in his contention that no vendor's lien arose on the facts averred.

The vendor's lien is a creature of equity, brought into being when land is conveyed, for the relief of the vendor against the unconscionable vendee, who would retain the property without paying the price. The court does not so exercise itself for the relief of vendors of personalty. And where there has been a sale of both real and

[Hanvey v. Gaines.]

personal property, under an entire contract for a gross sum, the parties having failed to separate and distinguish the considerations, the court will not undertake to do so. A debt, to come within the principle upon which equity declares a lien for its security, must be contracted in the purchase of real estate, and it was said in *Betts v. Sykes*, 82 Ala. 381, 2 South. 649, that "no other consideration must, in the slightest degree, enter into it."—*Stringfellow v. Ivie*, 73 Ala. 209. Nothing of this is denied, but question is made about the operation and effect of these principles in the case made by the bill.

More narrowly defined, the question is whether, on the meager facts averred, the property referred to in the bill as "a saw mill, shingle and grist mill and cotton gin combined," must be taken and held to have constituted a part of the consideration on which defendant conveyed the tract of 3½ acres and promised to pay the sum of \$1,300, and, if so, then whether any part of the property so referred to must for the purposes of the case be considered as personalty. Whether the bill is artfully drawn, as appellant suggests, or artlessly, in that it makes at best a meager statement of the facts, we cannot know. On demurrer we must construe it most strongly against the pleader, appraising it, however, at its fair value, and without assuming, either to help or hurt complainant's case as stated, the existence of facts of which the bill contains no intimation.

Complainant was not required to set out the deed he made in verbis, though he would have simplified the case had he done so. He might plead it according to its legal effect, and this he has undertaken to do. The purpose of the bill is to have a lien declared on the "land." If the deed which complainant made had described the land in question by metes and bounds, with

[Hanvey v. Gaines.]

out more, and had been set out in full, there would have been no difficulty about the equity of the bill. The "saw mill, shingle and grist mill and cotton gin combined," either passed as a part of the realty, or they did not pass, because they were personalty, with reference to which the deed (the contract) says nothing. In either case complainant is entitled to a lien on the "land." In the first, there was no personalty to complicate the contract; in the second, there was no contract with respect to personalty.

But if, as appellant seems to assume, and as perhaps we might infer without straining too much, the deed which complainant made, after describing the land by metes and bounds, proceeded to recite that "on said lands is a saw mill, shingle and grist mill and cotton gin combined, which have been operated since 1897, and said lands are otherwise known as the R. A. Gaines mill property," it is not probable that the "saw mill, shingle and grist mill and cotton gin combined," were referred to for the sole purpose of further description of the land upon which they stood. The bare land was sufficiently described by metes and bounds and by its designation as the "R. A. Gaines mill property," and, in the absence of words of bargain and sale in connection with those structures, we have no doubt that the mention of the "saw mill, shingle and grist mill and cotton gin combined," ought to be taken as evincing the common understanding and intention of the parties that they passed with and as part of the land. That the building in which it is reasonable to suppose the machinery has been housed is a part of the freehold there is no occasion to doubt. "With us, mere use in connection with a business does not necessarily so annex machinery to the realty as to constitute it a part of it. Intention is more or less a factor in such inquiries."—*Rogers v.*

[Hanvey v. Gaines.]

Prattville Mfg. Co., 81 Ala. 487, 1 South. 646, 60 Am. Rep. 171. The fair, if not the necessary, intendment of the language of the bill, and of the deed on the hypothesis under which we are just now proceeding, is that the "saw mill, shingle and grist mill and cotton gin combined," which had been upon the $1\frac{1}{4}$ acres conveyed since 1897, were in some sort attached to the land, and were buildings and things set in place there for the owner's permanent use in connection with the land. Sawmill machinery, shingle machines, and milling machinery, when set in place for permanent use, are generally considered to become parts of the realty.—13 Am. & Eng. Encyc. 664, note 3. A gin head, under our decisions, is not a fixture.—*Hancock v. Jordan*, 7 Ala. 448, 42 Am. Dec. 600; *Gresham v. Taylor*, 51 Ala. 505; *Langston v. State*, 96 Ala. 44, 11 South. 334. But a gin house, the running gear thereof, and a packing screw, are fixtures, and pass with the freehold.—*McDaniel v. Moody*, 3 Stew. 314. In the vernacular of the cotton belt, an assemblage of buildings and machinery where cotton is ginned and packed is called a gin, and where the owner so intends we see no reason why a gin head, or gin proper, should not become a part of the realty to which it is attached. We are not disposed to the notion that there should be a strict construction and application of the technical law of fixtures in order to defeat the vendor's equitable lien. On consideration of the facts presented by complainant's deed and his bill of complaint, we are of opinion that as between him and his vendee the "saw mill, shingle and grist mill and cotton gin combined," are a part of the realty, passed by the deed, and therefore that, however it may appear in the proof to be offered, no reason has as yet appeared why complainant is not entitled to the lien which he asserts, and which equity prima facie implies where

[Martinez, et al. v. Meyers, et al.]

there has been a sale of land and the purchase money remains unpaid. The final result will depend upon the proof. On any proper construction of the bill the demurrer, as for the grounds assigned, was correctly overruled.

Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

Martinez, et al. v. Meyers, et al.

Bill to Correct Guardianship Settlement.

(Decided April 17, 1913. 61 South. 810.)

Guardian and Ward; Investment; Liability for Profits.—Where, by a single transaction, a guardian invested the funds of his ward in railroad stocks and bonds, and then sold the bonds for a sum equal to the amount invested, and afterwards sold the stock for \$2,603.00, and fraudulently represented that the profit was only \$100.00, he was liable for the balance of the proceeds of the stock.

APPEAL from Mobile Law and Equity Court.

Heard before Hon. SAFFOLD BERNEY.

Bill by Mary J. Martinez and others against Elizabeth D. Meyers and others to correct a guardianship settlement on the ground of fraud. From a decree sustaining demurrer to part of the bill, complainants appeal. Reversed, rendered, and remanded.

The allegations of the bill to which demurrers were sustained is that respondent, as guardian, invested a sum of money of the wards in bonds and stocks of a railroad company, the said transaction being single, and that she then sold the bonds alone for enough money to replace that invested, and had the stock left and that she later sold the stock for \$2,603, which was all profit, but fraudulently represented that the profit was only

[Martinez, et al. v. Meyers, et al.]

\$103, and defrauded the wards out of the other \$2,500. The bonds and stocks were in those of the Meridian Light & Railroad Company.

BROOKS & STOUTZ, for appellant. The bill was not subject to the demurrer, and the court was in error in sustaining the same.—*Meyers v. Martinez*, 172 Ala. 641; s. c. 167 Ala. 456; s. c. 162 Ala. 562.

LEIGH & CHAMBERLAIN, and WILLIAM C. FITTS, for appellee. The court properly sustained the demurrer.—*Martinez v. Meyer*, 167 Ala. 456.

McCLELLAN, J.—This is the fourth appeal in this cause.—*Meyers v. Martinez*, 162 Ala. 562, 50 South. 351; *Martinez v. Meyers*, 167 Ala. 456, 52 South. 592; *Meyers v. Martinez*, 172 Ala. 641, 55 South. 498. Under the authority of *Meyers v. Martinez*, 172 Ala. 641, 55 South. 498, the court erred in sustaining the demurrer “to so much of the said bill as seeks to charge defendant Elizabeth D. Meyers with the proceeds of the sale of stocks of the Meridian Light and Railroad Company.” The demurrer addressed to the whole bill was overruled. Upon that authority the decree appealed from is reversed. A decree is here entered, overruling the demurrer; and the cause is remanded.

Reversed, rendered, and remanded. All the Justices concur, except DOWDELL, C. J., not sitting.

[Southern St. F. & C. Ins. Co. v. Cromartie.]

Southern St. F. & C. Ins. Co. v. Cromartie.

Bill to Cancel Sale of Stock for Fraud.

(Decided April 17, 1913. 61 South. 907.)

Contracts; Sale of Stock; Rescission; False Representation.—Where an agent, in order to sell certain stocks of his corporation, made false representations to a third person in the presence of the complainant, who immediately opened negotiations to purchase certain shares thereof through the same agent, and the agent sold him certain shares with knowledge that he had been present at the former interview, and had heard the false statements made to the third party, it was the duty of the agent to inform complainant of the true facts before selling him the stock, and if he failed to do so, the fraud was the same as though the representations had been made to complainant in the first instance, amounted to a re-affirmation of them, and thus entitled complainant to rescind.

APPEAL from Jefferson Chancery Court.

Heard before Hon. A. H. BENNERS.

Bill by A. B. Cromartie against the Southern States Fire & Casualty Insurance Company, to rescind for fraud the contract for sale of certain shares of stock in said corporation. Decree for complainant and respondents appeal. Corrected and affirmed.

LAMKIN & WATTS, for appellant. Representations which are mere matters of opinion are not such fraudulent representations as constitute a defense to an action on subscription.—Story's Eq., sec. 199; Thompson on Corp., sec. 722.

GORDON & EDDINGTON, for appellee. The representations were made in the presence of appellee, and were sufficient to authorize the rescission of the contract.—*Leonard v. Roebuck*, 152 Ala. 350; Secs. 4298-9, Code 1907; *Whatley v. S. S. F. & C. I. Co.*, in MSS.

[Southern St. F. & C. Ins. Co. v. Cromartie.]

SOMERVILLE, J.—The pleading and evidence in this case are substantially the same as in the cases of *This Appellant v. Brannon*, 178 Ala. 115, 59 South. 60, *Same v. Tanner*, 180 Ala. 30, 60 South. 81, and *Same v. Wilmer Store Co.*, 180 Ala. 1, 60 South. 99, decided adversely to appellant.

The point is made here, however, that the alleged false representations were made by defendant's agent Cozart to Brannon, and not to complainant, and hence the latter had no right to act upon them, nor to complain of their falsity. The evidence shows that Cozart was engaged in selling defendant's stock to Brannon, and that the representations in question were made directly to him, but it shows also that they were made in the presence and hearing of complainant, and, further, that they attracted his attention and enlisted his interest in the stock as an investment. Immediately following the transaction with Brannon, complainant purchased from Cozart 20 shares of the stock. Cozart knew of complainant's presence; and that he had heard the false statements made to Brannon. Hence, to all intents and purposes, these representations were made to complainant, and, under the circumstances shown, he had a right to rely upon them.

Moreover, since Cozart knew that complainant was misinformed as to material facts, by Cozart's own willful statements, it became his positive duty to inform complainant of the true facts before he sold him the stock; and, failing to do so, his wrong was morally and legally the same as if he had originally made the false statements personally to complainant, and amounted in fact to a reaffirmation of them.

The interest allowed in the decree should have been on \$500 instead of \$520, making the true amount

[Union Baptist Church, et al. v. Roper.]

\$556.25. The decree will be corrected in this particular, and, as corrected, will be affirmed.

Corrected and affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

Union Baptist Church, et al. v. Roper.

Bill to Foreclose a Mortgage.

(Decided February 13, 1913. 61 South. 288.)

1. *Lost Instrument; Mortgages; Foreclosure; Proof Required.*—Before equity will foreclose a lost mortgage, its execution and former existence must be as clearly established as though the bill had been primarily filed to establish it as a lost instrument.

2. *Same; Evidence.*—The evidence considered and held insufficient to show the execution of the mortgage sought to be foreclosed.

(McClellan, J., dissents.)

APPEAL from Mobile Law and Equity Court.

Heard before Hon. SAFFOLD BERNIEY.

Bill by William H. Roper against the Union Baptist Church of Mobile, and others, to foreclose an unrecorded mortgage alleged to have been destroyed by fire. Decree for complainant and respondents appeal. Reversed and rendered.

B. BOYKIN BOONE, for appellant. The same measure of proof is required here as would be required in a bill to reform the instrument, or to establish it as a lost instrument.—*Shorter v. Shepherd*, 33 Ala. 468; *Loftin v. Loftin*, 96 N. C. 94; *Elyton L. Co. v. Denny*, 108 Ala. 562. The evidence is insufficient to find that the mortgage had been executed, and hence, insufficient to authorize relief.—86 Me. 300; 19 Ill. 626; Am. Dec. 685; 25 N. Y. 125; 16 N. J. E. E. 401; 145 Pa. St. 497; 36 Atl. Rep. 954.

[Union Baptist Church, et al. v. Roper.]

GAILLARD & MAHORNER, for appellee. The burden laid upon complainant has been fully met by the evidence in this cause, and the court properly decreed the relief sought.—*Hill v. Helms*, 86 Ala. 442; *Shorter v. Shepard*, 33 Ala. 648; *Farrior v. N. E. M. Co.*, 88 Ala 275.

DE GRAFFENRIED, J.—This bill was filed on January 10, 1910, by Wm. H. Roper against the Union Baptist Church of Mobile, and sought the foreclosure of a mortgage which the complainant alleges was executed and delivered to him by the respondent on or about June 20, 1890, to secure an alleged indebtedness of \$500. The bill alleges that the respondent made to the complainant 10 notes of \$50 each, the first note maturing 90 days after its date, and the other 9 maturing successively 90 days after the maturity of the previous note, and that said mortgage was executed to secure the payment of said notes. The bill further alleges that the mortgage was never recorded, and that said notes and mortgage had been burned. The respondent filed an answer denying that it ever owed the complainant said money, and also denied that it ever executed the said notes and mortgage.

It will be seen from the above that the bill was filed nearly 20 years after the alleged execution and delivery of the notes and mortgage. The evidence of the complainant showed that said notes and mortgage—if they were ever executed—were destroyed by fire on the 13th day of May, 1900, nearly 10 years before this bill was filed. The complainant was a member of said church at the time of the alleged execution of said notes and mortgage, and at the time they are alleged to have been destroyed by fire, but he severed his connection with that church at least seven years before he filed this bill.

[Union Baptist Church, et al. v. Roper.]

To use his own language: "I ceased to be a member of the Union Baptist Church seven or eight years ago, seven I think. I ceased because of a good many little reasons. I became disgusted and withdrew myself."

We can understand why the complainant withheld his mortgage from the record. There was no law requiring him to record it, and, if he had produced it, the fact that it had not been recorded would have been worth nothing to the respondent. We can understand how the mortgage could have been destroyed by fire and can also understand why the complainant, so long as he remained a member of the Union Baptist Church of Mobile, even after the alleged destruction of the mortgage by fire, should have hesitated about filing this bill. We are not, however, able satisfactorily to explain to ourselves consistently with the existence of a duly executed and valid mortgage at the time of its alleged destruction the failure of the complainant for a period of at least seven years after he had become disgusted with said church, and had, for that reason, severed his connection with the said church, to invoke the aid of a court of equity to establish the mortgage or to file the present bill. When the mortgage was destroyed by fire—if it was so destroyed—a court of equity was open to the complainant, and would, at his instance, upon proper proof, have ascertained that the mortgage had been destroyed, and have re-established it for him. While the law did not require complainant to so act, nevertheless his failure so to do has resulted in the necessity for a mass of oral evidence covering the question as to whether the respondent 20 years before the time when the witnesses testifying about the matter were called upon to testify about the same owed the complainant any money or executed and delivered to him, in legal form, the notes and mortgage referred to.

[Union Baptist Church, et al. v. Roper.]

The long delay of complainant in seeking redress, especially that part of the delay which occurred subsequent to the alleged fire, and the absence of the mortgage from the records, are matters of grave import, when it is remembered that the delay has resulted in the death of most of those who were in a position to know most of this matter, and has certainly impaired the value of the testimony of witnesses called upon to give their recollection of an alleged transaction which occurred twenty years before they testified. Human recollection is subject to some uncertainty when at its best, and when that recollection relates to business matters and the details of business matters which occurred at so distant a period as twenty years, when there is no writing, no memorandum, no record from which the recollection can be refreshed, then human recollection, as a general rule, becomes frail indeed. While the complainant and his niece testify that the alleged notes and mortgage reposed in the appellant's desk from the time of their alleged delivery until their destruction by fire nearly 10 years before the filing of the bill, and while a former pastor of the church testifies that a mortgage was delivered to complainant, neither the appellee, his niece, nor the pastor attempts to testify that the mortgage was acknowledged, or that it had been otherwise executed in accordance with the formalities of law. While other witnesses testify that the mortgage was signed by the proper authorities of the church under the authority conferred upon them by a resolution adopted by the members of the church at a meeting called for that purpose, and there was evidence that said mortgage was signed before a notary public, all this is bitterly denied by many witnesses who testify in the case, and no writing, no memorandum, and no book of the church is before us showing that any such

[Union Baptist Church, et al. v. Roper.]

resolution was ever considered by its membership, and even the name of the notary public before whom the alleged mortgage was executed is not mentioned by any witness. Everything in this case is dependent upon human recollection, and on every subject the evidence is in direct conflict. The Union Baptist Church of Mobile is a church whose membership is composed exclusively of colored people, and it is evident to us that a large number of the witnesses who testify to the material facts of this case are ignorant and but little accustomed to the transaction of the character of business about which they testify. The appellee did, indeed, have summoned as a witness in his behalf the lawyer, who, it is claimed, prepared the notes and mortgage, and in whose office it is claimed that they were signed, but that witness died before he was examined. If he had testified, we would have had before us—conceding that his testimony would have been favorable to appellee—the recollection of a busy lawyer about the preparation of papers—the mere routine, ordinary, daily business of a lawyer's office—20 years before he testified.

These suggestions are thrown out simply to indicate the uncertainty and infirmity that must, necessarily, attach, under the circumstances of this case, to the appellee's own evidence, and upon the appellee is cast the burden of the proof as to all the material allegations of his bill of complaint. While this is not a bill to establish the alleged lost mortgage, but to foreclose a lost mortgage, equity will not grant relief unless the execution and former existence of the mortgage is as clearly established as if the bill had been filed primarily to establish such alleged lost mortgage. It has ever been the rule that, to justify relief in such a case, the proof of the execution and delivery of the lost deed, mortgage, or other paper writing should be clear and convincing.

[Union Baptist Church, et al. v. Roper.]

"The complainant, however, must not only account for the absence of the deed, but he must also clearly prove its existence as a genuine instrument. If he succeeds in making this preliminary proof, he will be permitted to show by parol the contents of the deed. But the evidence of such contents must be pointed and clear. No vague or uncertain recollection concerning its stipulations ought to supply the place of the written instrument itself."—*Shorter v. Sheppard*, 33 Ala. 648.

The church which it appears the appellee was active in organizing may in its refusal to meet the demands which appellee, in this bill seeks to enforce, unjustly deprive appellee of moneys which rightfully belong to him. While we cannot affirmatively say from all the evidence that such is not the situation, we can say affirmatively that appellee has not, when his evidence is weighed as it should be weighed, met that burden of proof "by clear and pointed evidence" required by courts of equity of the due execution and delivery of the mortgage which he seeks, in this proceeding, to foreclose. He may be right as to the justice of his claim, and the evidence, we think, establishes the fact that the church probably owes him the debt which he claims; but he has not, as we have already said, established the proper execution and delivery of a mortgage by that clear proof which a court of equity in cases like the present exacts. The trustees of the church may have relieved themselves, as some of the evidence tends to show, "of the burden which the church had placed upon them" by executing and delivering to complainant a proper mortgage, but if so, the appellee has not met, by corresponding clear and pointed evidence, the burden which a court of equity placed upon him when he invoked its jurisdiction to grant to him the relief prayed for in his bill.

[Bell v. Shiver, et al.]

The above being our conclusion, it is evident that we are of the opinion that the decree of the court below must be reversed.

The decree of the court below is reversed; and a decree is here rendered dismissing the complainant's bill.

Reversed and rendered.

DOWDELL, C. J., and ANDERSON, MAYFIELD, SAYRE, and SOMERVILLE, JJ., concur. MCCLELLAN, J., dissents.

Bell v. Shiver, et al.

Bill to Declare a Deed a Mortgage and to Redeem.

(Decided April 17, 1913. Rehearing denied May 8, 1913.
61 South. 881.)

Mortgages; Deed as; Debt; Necessity.—The test in determining whether an instrument is a mortgage, or a sale with the privilege of repurchasing, is the existence or non-existence of a debt to be secured, as the idea of a mortgage without a debt to be secured by it is a legal myth in our system of jurisprudence.

APPEAL from Coffee Chancery Court.

Heard before Hon. L. D. GARDNER.

Bill by R. E. Bell against Gus Shiver and others to declare a deed a mortgage, for an accounting, and to redeem. Decree for respondents, and complainant appeals. Affirmed.

The substantial facts made by the bill are that in 1908 complainant purchased from M. W. Crosson and wife certain real estate therein described, executing to Crosson his promissory note for \$50, and assuming an indebtedness on the land created by Crosson in the shape of a mortgage to the British American Mortgage Company, and that when the note to Crosson fell due, and the partial payment to the mortgage company be-

[Bell v. Shiver, et al.]

came due, orator did not have the money to pay them, and negotiated with Shiver with the view of borrowing money to pay off the indebtedness, which negotiation resulted in Shiver's agreeing to loan him the money required to buy the place, and to meet the subsequent payments. It is further alleged that Shiver was unwilling to make the loan unless he was secured in the same by the execution to him of the deed to the land, as he said he would rather have it secured that way, as he wanted more than the legal rate of interest, requiring \$100 per year, which would be called rents upon the land; that the contract was that Shiver would loan orator enough money to pay Crosson, and to meet the several installments of principal and interest upon the indebtedness due the British American Mortgage Company, whereupon orator and wife would execute to Shiver the deed to the lands, and Shiver did pay the amount due Crosson, and the principal and interest payments due the mortgage company. It is then averred that Shiver was never in possession, but that orator was delivered possession by Crosson, and has been in possession since, and has paid Shiver \$100 interest each year, up to the time of filing this bill; and orator avers that he did offer to pay the said sum of \$100 each year as interest on said land, and that said Shiver did agree to accept such sum as interest upon such land, making up a usurious contract, from which it is sought to relieve orator from the payment of any interest on the loan, and to apply the payments already made to the principal of the loan, and that Shiver now denies that the deed was intended as a mortgage, but claims it to be a deed, and is about to sell the land, or has contracted to sell it, to one Horn. There is an offer to pay whatever is found due, with the prayer as above set out.

[Bell v. Shiver, et al.]

RILEY & CARMICHAEL, for appellant. Under the facts in this case it was the duty of the court to declare the instrument a mortgage, to state an account between the parties and permit redemption.—*Haney v. Robertson*, 58 Ala. 37; *Loggrod v. Hussey*, 60 Ala. 417; *Johnson v. Hataway*, 46 South. 760.

J. F. SANDERS, for appellee. No brief reached the Reporter.

ANDERSON, J.—The preponderance of the evidence shows that the deed, unconditional on its face, was made to the respondent upon the consideration of \$1,050, being the amount due the British & American Mortgage Company, and a note of \$50 due Crosson, and that the execution of the deed released the complainant from any liability to the respondent for the sums paid by him to Crosson or the mortgage company, whether the evidence of these debts was marked satisfied or was transferred to Shiver. In other words, the evidence fails to fix any liability upon Bell to repay Shiver, except upon condition that he (Bell) chose to repurchase the land from Shiver. "One of the distinguishing tests by which to determine whether an instrument is a mortgage, or a sale with the privilege of repurchasing, is the existence or nonexistence of a debt to be secured. If there be no debt due from the grantor to the grantee, there can be no mortgage. The idea of a mortgage without a debt to be secured by it is a legal myth in our system of jurisprudence.—*Vincent v. Walker*, 86 Ala. 336 [5 South. 465]; *Douglass v. Moody*, 80 Ala. 61." *Nelson v. Wadsworth*, 171 Ala. 603, 55 South. 120.

The decree of the chancery court is affirmed.

Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

[Pippen v. Harris, et al.]

Pippen v. Harris, et al.*Bill to Restrain Infringement of Trade Mark.*

(Decided April 24, 1913. 61 South. 890.)

1. *Trade Marks; Infringement; Issue and Proof; Variance.*—Where the bill charged that the respondents had sold and represented to the purchasing public by unfair and fraudulent trade competition products known as Viva, and that such customers had been deceived and defrauded to the injury of complainant's business, it was not supported by proof that salesmen or drivers of the respondent had made such fraudulent representations as to the product they sold being complainant's product, there being no tendency to show that the respondent himself was guilty thereof or ratified the acts of his agents.

2. *Same; Burden of Proof.*—In an action to restrain unfair and fraudulent business competition, complainant had the burden of proof.

APPEAL from Jefferson Chancery Court.

Heard before Hon. A. H. BENNERS.

Bill by J. L. Pippen against Allen Harris and others, doing business as the Camel Bottling Works, seeking to restrain an infringement of complainant's trade mark and trade name, and from molesting and injuring complainant's business by unfair and fraudulent trade competition. From a decree dismissing the bill complainant appeals. Affirmed.

R. J. McCLURE, for appellant. The bill contains equity and complainant is entitled to relief.—*Kyle v. Perfection Mattress*, 28 South. 545; 138 N. Y. 244; 50 N. J. E. 164; 19 L. R. A. 269; 14 L. R. A. 161; 96 U. S. 246; 88 Fed. 899. Counsel also discusses the action of the court in dissolving temporary injunction, but in view of the opinion it is not deemed necessary to here set it out.

[Pippin v. Harris, et al.]

ALLEN & BELL, and JOHN T. GLOVER, for appellee. The decree is rested upon the theory that plaintiff has not made out his case. The burden of proof was on him to establish the allegations of the bill, and this he failed to do.—34 L. R. A. 174.

MCCLELLAN, J.—This bill, filed by appellant against appellees, seeks to restrain respondents from infringing upon complainant's registered trade-mark and trade-name, Viva, a soft drink, and from molesting and injuring complainant's business by respondents' unfair, fraudulent trade competition. The temporary injunction issued when the bill was filed was dissolved and the bill dismissed upon the final hearing of the cause on pleadings and proof. The evidence entirely fails to show any infringement or fraudulent use of the complainant's registered trade-mark or trade-name, Viva, a material allegation of wrong with which the bill charges these respondents.

It is also averred that the respondents "have represented to the purchasing public that their product was Viva, and have sold it to a large number of orator's customers for Viva, and the customers have been deceived and defrauded into thinking that they were purchasing Viva, and have purchased this product." While there is testimony tending to show that employers or drivers of the sales and delivery wagons of respondents made the false and fraudulent representations averred with respect to the identity, etc., of a produce they sold as Viva, there is no evidence that Allen Harris (doing business as the Camel Bottling Works) himself so wronged the complainant as is averred or even that he knew of, authorized, or ratified the false and fraudulent statements attributed to his employees. Indeed had the complainant attempted to conform his allega-

[Board of Commissioners City of Mobile, et al. v. Orr.]

tion to his proof, he would have framed his pleading so as to impute the wrong of the agent to the principal. This, however, complainant did not do.

There is testimony to like effect with reference to the employees of Oldham and Forcester. As indicated with respect to Allen Harris, there is want of conformity between allegation and proof. Notwithstanding this, when the whole evidence is considered in the light of the burden of proof assumed by and resting upon complainant, we are not convinced, as the learned chancellor was not, that the burden on complainant has been discharged.

The only error assigned refers alone to the final decree on testimony submitted. Much of the argument for appellant treats questions which could only arise on the hearing of a motion to dissolve a temporary injunction.

The decree is affirmed.

Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

Board of Commissioners City of Mobile, et al. v. Orr.

Bill to Enjoin Enforcement of an Ordinance.

(Decided April 10, 1913. 61 South. 920.)

1. *Constitutional Law; Class Legislation; Classification.*—Statutes may classify and discriminate between classes if the classification is founded on distinctions reasonable in principle and having just relations to the object to be accomplished.

2. *Same; Ordinances; Reasonableness.*—A wide discretion is conceded to the legislative branch of city governments in the adoption of ordinances to promote public health and comfort, but in the exercise of the court's ancient jurisdiction, such ordinances will be declared void if they are unreasonable or inconsistent with the gen-

[Board of Commissioners City of Mobile, et al. v. Orr.]

eral purposes of the law of the land, especially when referring to the liberty of the citizen and his right of private property.

3. *Same*.—An ordinance is invalid for inequality and unreasonableness which provided that all stables within the city's jurisdiction where two or more horses, mules or cows were kept, should be connected with the water mains and sanitary sewers of the city, and that the stalls, pens, etc., should be paved with cement or brick, according to particular specifications, and imposing fines and penalties for failure to do so after notice, where the city's jurisdiction extended a considerable distance beyond its sewer system.

4. *Same; Public Health; Regulation*.—While the regulation of the keeping of animals within the limits of a city is a proper subject for police regulation to conserve the public health, yet where the city permits the disadvantages arising from the collection of animals in groups or numbers, there is no reasonable grounds for classification in the regulation of animal pens within the city between the keepers of single animals and those who keep two or more.

5. *Injunction; Subjects; Criminal Ordinance; Property Rights*.—While a court of equity will not enjoin criminal or quasi criminal prosecutions under a city ordinance because the ordinance is invalid or unreasonable, though the consequences to the complainant of allowing the prosecution to proceed may be grievous and irreparable, there being an adequate remedy at law, yet the courts will interfere by injunction where such prosecutions will destroy or impair property rights.

6. *Same*.—Where the ordinance would require large expenditures to comply therewith and repeated prosecutions under it had been threatened, and complainant is left to the alternative of going to considerable expense to comply with the ordinance, or submit to the vexation of repeated prosecutions under a void ordinance, equity will enjoin the enforcement of the ordinance until its validity can be determined.

APPEAL from Mobile Chancery Court.

Heard before Hon. THOMAS H. SMITH.

Bill by Wade H. Orr against the Board of Commissioners of the City of Mobile and the City Health Officers to enjoin the enforcement of an ordinance requiring the paving of certain stables and connection thereof with the city sewerage system, and to declare the ordinance invalid as unreasonable. From a decree granting a preliminary injunction, respondent appeal. Affirmed.

The bill alleges that the complaint comes within the purview of a certain ordinance adopted by the board of commissioners of the city of Mobile to become effective

[Board of Commissioners City of Mobile, et al. v. Orr.]

after January 1, 1913. It is alleged that the complainant would have to spend several hundred dollars in order to lay the cement floor required by the ordinance and would have to procure other quarters for his stock while the floor was being laid and while it was hardening. It is further alleged that the ordinance is unconstitutional and unreasonable: First. Because it is limited to persons who keep more than one animal, requiring the man who keeps more than one to lay a floor according to specifications, while he who keeps only one animal is not required to do so, although, in fact, there is no sanitary distinction which would justify such a classification, and, on the contrary, the aggregate number of horses, mules, and cows which are kept in the city of Mobile by persons who own only one animal largely exceeds the aggregate number of horses, mules, and cows which are kept in the city of Mobile by persons keeping two or more animals. Second. That the ordinance is unreasonable because of the expense required to comply with it, and because the mineral floors, uncovered by wood, would be seriously injurious to the animals kept therein, and for other reasons not necessary to here state. Other matters are set up as rendering the ordinance unreasonable and void, but they sufficiently appear from the opinion. The ordinance is as follows:

“Be it ordained by the board of commissioners of the city of Mobile:

“Section 1. That every stable, shed or lot, where two or more horses, mules or cows are kept, in the city of Mobile, shall be thoroughly cleaned at least once each day; and when such animal or animals are kept in a stable, shed or other building, such building shall have sufficient light to make cleaning practicable, and sufficient ventilation to keep the air of such building at all times

[Board of Commissioners City of Mobile, et al. v. Orr.]

pure; and no person or corporation shall maintain or use any stable for two or more such animals in violation of this ordinance.

"Sec. 2. That every stable, shed, or other building, where two or more horses, mules or cows are kept, shall have either within, or immediately adjoining, a water-tight, covered room, or box or bin barrel, for receiving and holding manure and litter accumulating between the times of removal from the premises. The fitness of such room, box, bin, or barrel shall be passed upon by the city health officer.

"Sec. 3. Be it further ordained, that all stall floors in stables shall drain into gutters, the said gutters to be connected through catch basins with the sanitary sewerage system of the city, in accordance with section 671 of the Code of Ordinances of the City of Mobile of 1907.

"Sec. 4. That the floors of all stables must be constructed of concrete at least four inches thick, with a smoothly troweled wearing surface at least three-fourths of an inch thick, composed of Portland cement, and in the proportion of one part to one and one-half parts of sand: Provided, that in lieu of a cement wearing surface, vitrified paving brick with grouted cement joints, or other substantial mineral pavement impervious to water and not less than four inches thick, may be substituted. The floor of stalls or portions of the floor on which animals stand may be of concrete, brick or other substantial mineral pavement as specified above, or may be constructed of creosote wood blocks laid on a concrete foundation, or of planking laid on such foundation: Provided, further, that the floors which are affected by the provisions of this section are the floors of the stalls and of a space not less than three feet outside of the stalls, where stalls are used, and the

[Board of Commissioners City of Mobile, et al. v. Orr.]

floors of the pens where stock is penned and held or fed; and this section shall not apply to any portion of a stable which is not used for stabling, standing, hitching, picketing, or penning stock, but only used for a passage or runway.

"Sec. 5. That a three-quarter inch hosebib, equipped with hose, shall be placed so that the drainage system may be readily flushed; and that all stable floors must be thoroughly cleaned and flushed as often as necessary, and at least twice each week.

"Sec. 6. Be it further ordained, that every person, firm, association or corporation upon whose or its premises, within the city of Mobile, is kept one or more horses, mules or cows, shall register at the office of the board of health the name of the owner, the location where such animal or animals are kept, and the number of the animals at any given location.

"Sec. 7. Be it further ordained, that any violation of this ordinance by any person, firm, association, or corporation shall be punished by the recorder by a fine of not less than ten dollars or more than one hundred dollars for the first offense, and not less than five dollars per day for each succeeding day that the offense continues after notice has been given by the city health officer.

"Sec. 8. Be it further ordained that this ordinance shall be in force and effect from and after the date of its adoption: Provided, however, that compliance with sections 5 and 4 may be delayed until the first day of November, 1912; and thereafter, the entire ordinance, without exception, shall be in full force and effect."

Section 4, as above quoted, is an amendment of section 4 as formerly adopted, and the ordinance was further amended by the following:

[Board of Commissioners City of Mobile, et al. v. Orr.]

"Sec. 7. Be it further ordained, that this ordinance and the amendment of section 4 this day adopted shall be in force and effect from and after January, 1, 1913."

B. BOYKIN BOONE, for appellant. The ordinance as applied to the agreed statement of facts is not violative of any provision of the national constitution.—*Mugger v. Kansas*, 123 U. S. 623. Neither does the ordinance violate any provision of the state constitution. *Ex parte Bird*, 84 Ala. 18; 82 N. Y. 318; 16 Mo. App. 131. The court has no jurisdiction to enjoin respondent.—*L. & N. v. Port of Mobile*, 84 Ala. 119; 67 Am. Dec. 186; *Burnett v. Craig*, 30 Ala. 165; *Brown v. Mayor of B'ham*, 140 Ala. 590; *Old Dominion Tel. Co. v. Powers*, 140 Ala. 220; *Moses v. Mobile*, 52 Ala. 198; 172 U. S. 516; 124 U. S. 200. The ordinance was not void as a discrimination.—*Ex parte Bird, supra*; 55 Ar. St. Rep. 385; McQuillan Mun. Ord. 909. The authority of the city to pass the ordinance is unquestioned.—Secs. 1251, 1278, Code 1907; 162 Ill. 503; 149 Ill. 378; Cooley's Const. 138; *Town of Greensboro v. Ehrenreich*, 80 Ala. 581.

GREGORY L. & H. T. SMITH, for appellee. There is no question of the authority of the chancery court to restrain the enforcement of the ordinance here.—*Port of Mobile v. L. & N.*, 84 Ala. 115; *Town of Cuba v. Mississippi C. O. Co.*, 150 Ala. 259. The ordinance is unconstitutional because it discriminates between the owner of one animal and the owner of two or more animals.—Sec. 1230, Code 1907; *Cuba v. Mississippi C. O. Co., supra*; *Town of Crowley v. West*, 27 South. 53; 55 Pac. 403; 58 Pac. 1089; 67 N. E. 846; 51 N. E. 136. The ordinance is unreasonable, and therefore, void.—39 Atl. 706; 130 N. W. 934; 82 N. W. 445; 73 N. E. 1035.

[Board of Commissioners City of Mobile, et al. v. Orr.]

SAYRE, J.—The statutes of the state, with which the quasi legislative acts of inferior municipal bodies must be classed so far as concerns the constitutional requirement of equal laws, are not to be put aside by judicial decree, except upon satisfactory assurance that they do offend against the principle of equality. Classification, or discrimination between classes, is allowed if founded upon distinctions reasonable in principle and having just relation to the object sought to be accomplished. The courts concede a wide discretion to the legislative authority in respect of the grounds of classification, and must be reluctant to disturb even a municipal ordinance enacted in pursuance of a comprehensive grant of power, and designed presumably to promote the public health and comfort, but the power to condemn is more freely exercised in such cases, for, as to municipal ordinances, it was an ancient jurisdiction of judicial tribunals to pronounce upon their reasonableness and consequent validity. It was always the doctrine of the courts that every ordinance or by-law must be reasonable and not inconsistent with the general principles of the law of the land, particularly those having relation to the liberty of the citizen and the rights of private property.—*Yick Wo v. Hopkins*, 118 U. S. 371, 6 Sup. Ct. 1064, 30 L. Ed. 220.

The ordinance in question is challenged as being unreasonable and violative of that equal protection of the law which is guaranteed by the fourteenth amendment of the Constitution of the United States. While, on our common knowledge of the considerations of fact involved and such information as we gather from the sworn bill and the other affidavit upon which the chancellor acted in granting the preliminary injunction, we would not feel justified in declaring unreasonable and oppressive that part of the ordinance which regulates

[Board of Commissioners City of Mobile, et al. v. Orr.]

the materials with which stalls and pens must be floored and the manner of laying the floors as involving too great expense and as unnecessarily injurious to animals compelled to stand and sleep upon them, though possibly that may appear to be proper on full proof, yet on consideration of the face of the ordinance and those undisputed consequences which will follow its enforcement throughout the territory to which it is applicable, in connection with the aforementioned principles of law, we feel constrained to the opinion that wherein it requires stalls and stables to be connected with the water mains and sanitary sewers of the city the ordinance will work unconscionable hardship to many who fall within its terms, and that wherein it undertakes to divide the owners and keepers of animals into two classes it proceeds upon no sound basis and is unreasonably discriminatory and invalid.

The manifest purpose of the ordinance is to provide for the sanitation of the city and the comfort of its inhabitants. The effort is to exert the police power by which the owner of property may be limited in the exercise of his ownership; and, if thereby he is damaged to some extent, he is nevertheless in contemplation of law compensated and made whole by sharing in the advantages which flow from regulations demanded by the common good. The keeping and housing of animals is peculiarly a business which may or may not be offensive and hurtful according as it is carried on.—2 Cooley on Torts, 1251. Because of its tendencies it has long been recognized as the proper subject of police regulation, and we are not disposed to any narrow interpretation of the power which may be exercised for the public health and comfort. A reasonable line of distinction may be drawn between the case of keepers of single animals and that of keepers of many, as, for exam-

[Board of Commissioners City of Mobile, et al. v. Orr.]

ple, public livery stables and dairies. The presence of aggregations of animals in crowded quarters, be they never so scrupulously housed and kept, may be cause of annoyance and offense to the neighborhood, and may therefore with good reason be prohibited within areas in which the keeping of single animals is allowed. But if the municipality chooses to tolerate those inevitable disadvantages which attend the collection of animals in groups, it occurs to us that there are no sufficient reasons why similar feasible sanitary conditions should not be required in the case of keepers of single animals as well as in that of the keepers of two or more. If the public health and comfort require that where two or more animals are kept together they shall stand upon concrete floors, their droppings kept in watertight receptacles, their stalls or pens connected with water mains, drained into sanitary sewers, and thoroughly cleaned at least once each day, all to the good end, no doubt of preventing the diffusion of odors and the breeding of the pestilent fly, it would seem that an impartial imposition of the burdens of police regulation ought to exact similar precautions of the keepers of single animals far more numerous in the aggregate.

Again, the affidavits show that there are wide, though thinly populated, areas of the outlying territory within three miles of the corporate limits, known as the police jurisdiction of the city of Mobile, over which its police and sanitary regulations, prescribing fines and penalties for violations thereof, have force and effect (Code, § 1230), and similar areas within the city proper, far removed from either the water mains or the sanitary sewers of the city, so that, practically speaking, persons keeping animals within these areas will be unable to comply with the requirements of the ordinance. The ordinance, however, without qualification or limitation.

[Board of Commissioners City of Mobile, et al. v. Orr.]

is applicable to the keepers of two or more animals within this territory. Ordinances are to be construed benevolently, it has been said, and the terms of ordinances and statutes alike are subject to certain practical limitations. Such is the case with most laws couched in comprehensive terms. We would find no difficulty, therefore, in holding that a practical exception must be grafted on the ordinance in favor of the keepers of stables far removed, say, a mile, from any sanitary sewer of the city. But cases might arise under the ordinance in question in which it might be a matter of great difficulty to determine whether a stable should in reason be required to have connection with a sewer, and that possibility tends strongly to shake the authority of the ordinance. Where exceptions are to be determined, not upon consideration of the nature of the thing required, but upon conditions which furnish just ground of classification, the legislative will of the municipality ought to find expression in the definite and discriminating language of the ordinance. It is not the business of the courts to amend municipal ordinances or lick them into shape on their own notions of convenience, feasibility, and justice, to meet the exigencies of particular cases. It is for the legislative authority, not the judicial, to classify. So, then, without holding that the ordinance under consideration would be so unreasonable as to be void if it were limited to particular districts of the city and made applicable alike to all keepers of animals within the district, on the case presented we have reached the conclusion that within large areas of the city and its police jurisdiction the ordinance in its present shape is practically impossible and unreasonable, and that everywhere it is discriminatory, without reasonable basis for discrimination.—

[Board of Commissioners City of Mobile, et al. v. Orr.]

Chicago v. Gunning System, 214 Ill. 628, 72 N. E. 1035, 70 L. R. A. 230, 2 Ann. Cas. 892.

But appellant denies the right of the chancery court to interfere. It is a plain proposition of law that equity will not exert its powers merely to enjoin criminal or quasi criminal prosecutions, "though the consequences to the complainant of allowing the prosecutions to proceed may be ever so grievous and irreparable."—*Brown v. Birmingham*, 140 Ala. 600, 37 South. 174. "His remedy at law is plain, adequate, and complete by way of establishing and having his innocence adjudged in the criminal court."—*Id.* To the same unquestionable effect are *Old Dominion Telegraph Co. v. Powers*, 140 Ala. 220, 37 South. 195, 1 Ann. Cas. 119, and other cases cited there and in *Brown v. Birmingham*, *supra*. As for multiplicity of prosecutions, it is said in the last-mentioned case that: "The occasion and necessity for such suits may be avoided by his simple desistance from repeated violations of the ordinance while its validity is being tested in one prosecution." But this court has with equal clearness recognized the power and duty of the equity courts to interfere by injunction where quasi criminal prosecutions under municipal ordinances will destroy or impair property rights.—*Brown v. Birmingham*, *supra*; *Bessemer v. Bessemer Water Works*, 152 Ala. 391, 44 South. 663; *Bryan v. Birmingham*, 154 Ala. 447, 45 South. 922, 129 Am. St. Rep. 63; *Town of Cuba v. Mississippi Oil Co.*, 150 Ala. 259, 43 South. 706, 10 L. R. A. (N. S.) 310; *Mobile v. L. & N. R. R. Co.*, 84 Ala. 115, 4 South. 106, 5 Am. St. Rep. 342; *Montgomery v. L. & N. R. R. Co.*, 84 Ala. 127, 4 South. 626. Now, in the case made by the bill, the city of Mobile, acting through its duly constituted officers, is seeking to enforce a void municipal ordinance which would impose serious financial burdens upon complainant both by rea-

[Board of Commissioners City of Mobile, et al. v. Orr.]

son of the expenditure of money necessary to put his property in the required condition and by reason of losses which will be necessarily caused by the interruption of his perfectly legitimate and highly useful business, which is also his property and entitled to some measure of protection. The ordinance provides that any violation shall be punished by a fine for each day the offense continues after notice has been given by the health officer of the city, and the averment is that the health officer has publicly stated and intends to cause the arrest of complainant, if he fails to comply, and to continue to have him arrested constantly and repeatedly until he does comply, or until the ordinance is declared null and void by the courts of the land. Complainant could not adequately and completely meet the situation here shown by desistance from repeated violations of the ordinance while its validity is being tested in one prosecution. Mere inaction will not avail him, nor, under the circumstances alleged, is it to be expected that one prosecution will be allowed to determine his rights. He must either go to very considerable expense to comply with the ordinance, though void, or he must submit to the vexation of repeated prosecutions without warrant, though under color of law. And herein we think the present case is to be distinguished from *Forcheimer v. Mobile*, 84 Ala. 126, 4 South. 112. This situation of the complainant, we think, also takes his case without the controlling influence of *Brown v. Birmingham* and *Old Dominion Telegraph Co. v. Powers*, *supra*, where no property rights were involved, and brings it fairly within that class of cases in which equity will intervene for the prevention of oppressive and vexatious litigation affecting property rights where it takes, or is about to take, the form of an effort to enforce a void municipal ordinance by means of repeated

[Phalin v. Dearman.]

prosecutions thereunder. To our own cases, which have been cited above, we may add *Baltimore v. Radecke*, 49 Md. 217, 33 Am. Rep. 239, which was cited in *Mobile v. L. & N. R. R. Co.*, *supra*, and *Davis v. Fasig*, 128 Ind. 271, 27 N. E. 726.

The chancellor's decree, ordering a preliminary injunction, will be affirmed.

Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

Phalin v. Dearman.

Bill for an Accounting.

(Decided April 24, 1913. 61 South. 941.)

Account; Equitable Action for; Mutuality.—Where there are mutual accounts between parties, either may resort to equity for a statement of the account, and to ascertain and recover any balance due regardless of whether there is a confusion or complication in the account, and whether or not complainant claims a balance due him.

APPEAL from Tuscaloosa County Court.

Heard before HON. HENRY B. FOSTER.

Bill by L. H. Dearman against G. W. Phalin, for an accounting. From a decree overruling demurrers to the bill respondents appeal. Affirmed.

JONES & PEARSONS, for appellant. Counsel discuss the bill and insist that it was subject to the demurrers interposed, but they cite no authority in support of their contention.

G. B. WORTHEN, and R. C. SPARKS, for appellee. Counsel discuss the errors assigned with the insistence that the court properly overruled the demurrers to the

[Harrison v. Carter.]

bill, but they cite no authority in support of their contention.

SOMERVILLE, J.—The allegations of the bill of complaint show the existence of *mutual* accounts between complainant and respondent. In such cases either party may resort to equity for a statement of the accounts and the ascertainment and recovery of any balance due, without regard to the question of confusion or complication.—*Kirkman v. Vanlier*, 7 Ala. 217; *Hulsey v. Walker County*, 147 Ala. 501, 40 South. 311; *Crichton v. Hayles*, 176 Ala. 223, 57 South. 696, collecting the authorities.

It is immaterial, of course, that the bill does not claim a balance in favor of complainant, for he is as much entitled to thus ascertain his indebtedness to respondent as to fix respondent's indebtedness to him. The demurrers to the bill were properly overruled, and the decree will be affirmed.

Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

Harrison v. Carter.

Bill for an Accounting and to Satisfy Mortgage.

(Decided May 1, 1913. 61 South. 802.)

Insane Persons; Contract; Cancellation; Proof.—Where complainant filed his bill to hold respondent as trustee for H., alleged to be mentally non compos, and to satisfy certain mortgages on that ground, and the preponderance of the evidence tended to show that when the transactions occurred, H. was not only attending to his own affairs, but was capable of doing so, and was possessed of the same character of mental ability when the bill was filed, and complainant had to rely on the testimony of H. to establish his allegations of fraud, the complainant did not carry the burden of proof resting on him, and his bill was properly dismissed.

[Harrison v. Carter.]

APPEAL from Monroe Law and Equity Court.

Heard before Hon. C. J. **TORREY**, Special Judge.

Bill by **W. T. Harrison** by next friend against **C. F. Carter**, for an accounting, to hold Carter as trustee for Harrison, and to satisfy certain mortgages. Decree for respondent and complainant appeals. Affirmed.

HYBART & HARE, for appellant. No brief reached the Reporter.

MCCLELLAN & RATCLIFF, for appellee. The burden was on complainant to sustain the averments of his bill, and his failure to do so authorized a dismissal of the bill whether it contained equity or not.

DE GRAFFENRIED, J.—In this case the judge of the Monroe law and equity court, sitting in equity, pretermitted the consideration of all questions as to the equity of the bill of complaint and denied relief to the complainant upon the ground that the evidence in the case did not sustain the material allegations of the bill, even if the bill contained equity. The bill of complaint proceeds upon the theory that **W. T. Harrison's** mind is so diseased that he is incapable of attending to business; in fact, that he is legally a non compos mentis; and, upon that theory, the bill was filed in the name of Harrison, by a next friend.

The evidence in the case tends to show that Harrison is illiterate, perhaps improvident, and that he is probably somewhat below the average uneducated man in mental capacity. The great preponderance of the evidence, however, shows that, when he had with the respondent, Carter, the transactions set up in his bill of complaint, he was not only attending to his ordinary business affairs, but that he was capable of attending

[Metcalf v. First State Bank.]

to them; and the evidence also shows that he was possessed of that same character of mental ability when this bill was filed and when this cause was submitted for final decree. In truth, the testimony of Harrison as to the facts of the case was taken and submitted as a part of the complainant's evidence, and it was upon Harrison's testimony (the testimony of the alleged non compos mentis) that complainant was forced to mainly rely to sustain the material allegations of his bill of complaint as to the fraud therein attempted to be set up.

We have read this record and all of the evidence with patient care, and we are of the opinion that the complainant failed to sustain by his evidence the material allegations of his bill of complaint, and that, whether his bill of complaint did or did not contain equity, he was not, under the evidence, entitled to the relief prayed for in his bill. A detailed discussion of the facts would prove of service to no one.

The decree of the court below is affirmed.

Affirmed.

All the Justices concur, except DOWDELL, C. J., not sitting.

Metcalf v. First State Bank.

Petition Questioning Receiver's Fees.

(Decided April 24, 1913. 61 South. 900.)

Appeal and Error; Findings; Conclusiveness.—The findings of a register on reference have the force and effect of a verdict of a jury, and will not be disturbed by the chancellor or appellate court unless plainly and palpably erroneous.

APPEAL from Jackson Chancery Court.

Heard before Hon. W. H. SIMPSON.

[Metcalf v. First State Bank.]

Petition by R. C. Brickell, as Attorney General, against the First State Bank of Bridgeport, J. W. Gay, receiver. From a decree allowing a certain sum for the receiver's services, W. W. Metcalf, an intervening creditor, appeals. Affirmed.

R. C. Brickell, as Attorney General, filed a bill at the request of the State Treasurer and Governor, setting up the insolvency of the First State Bank of Bridgeport, and asked that a receiver be appointed, which prayer was granted, and J. W. Gay appointed receiver. On a settlement with the receiver for his services, the matter was referred to the register to ascertain and report the amount reasonably sufficient to pay him for his services, who found and stated the amount to be \$1,000, \$140 expense account, and \$400 attorney's fees. W. W. Metcalf, a depositor in the defunct bank, and a creditor of the estate, filed objections to the report as to the \$1,000. The chancellor reduced it to \$750, but allowed that amount as compensation, and the creditor appeals.

LAWRENCE E. BROWN, for appellant. The estate ought not to be subjected to a double burden.—*Salisbury v. C. I. & R. R. Co.*, 110 Ala. 594. Compensation should be determined in the light of the particular facts and circumstances in the case in hand.—34 Cyc. 470; *Etowah M. Co. v. Wills V. M. Co.*, 106 Ala. 500. Receivers should be compensated on the same basis as guardians, receivers, etc.—*McGhee v. Cowperwaite*, 10 Ala. 966; *Gold v. Hayes*, 25 Ala. 432; 31 Ia. 423; 108 La. 74; 53 South. 716.

VIRGIL BOULDIN, for appellee. The register, after the examination of witnesses, determined the amount of compensation, the chancellor reduced the amount, and this court will not interfere.—*McKenzie v. Mathews*, 153 Ala. 537.

[Combs v. Greene, et al.]

ANDERSON, J.—The register saw and heard the witnesses upon the reference for the purpose of ascertaining the amount of compensation that should be awarded the receiver, Gray, and found that said Gray was entitled to \$1,000. The finding of the register was like unto the verdict of a jury, and should not be disturbed by the chancellor, or this court, unless plainly and palpably excessive.—*McKenzie v. Matthews*, 153 Ala. 437, 44 South. 958; *Denman v. Payne*, 152 Ala. 342, 44 South. 635. The chancellor reduced the award of the register to \$750, but which action we cannot review, as there was no cross-appeal.

It is sufficient to say, however, that the amount allowed by the chancellor was less than the award of the register, and we are not prepared to say that the finding of the register was palpably erroneous. The decree of the chancery court is affirmed.

Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

Combs v. Greene, et al.

Bill for Partition.

(Decided April 24, 1913. 61 South. 898.)

1. *Partition; Disputed Title; Jurisdiction of Equity.*—In an action for partition, equity has jurisdiction to determine the controverted question of title raised by the answer (section 5232, Code 1907).

2. *Descent and Distribution; Widow's Share.*—Upon a decedent's death, leaving no minor children, and leaving land of less value than \$2,000, and less than 160 acres in area, the absolute fee in such land passed to his widow, notwithstanding there has been no proceeding setting such lands apart to her as her homestead exemption.

APPEAL from Lee Law and equity Court.

Heard before Hon. LUM DUKE.

[Combs v. Greene, et al.]

Bill by Vindy Greene and others against Henry Combs for partition of land. From a decree granting complainants relief respondent appeals. Affirmed.

The bill alleges that the complainants and respondents John Whitton, Sidney Greene, and Willie Greene are tenants in common of certain lands, setting out the facts as they appear in the opinion. Henry Combs denied the joint tenancy, setting up that he was the sole owner of said property, and in the possession thereof, claiming it as his own, against all persons whatsoever.

LEADER & EWING, for appellant. Liza Combs had no title except a life estate.—Secs. 2069, 2071, Code 1896; *Medley v. Shipps*, 58 South. 305; *O'Daniel v. Gaynor*, 150 Ala. 205. It appears that there was no judicial ascertainment of insolvency, and no proceedings taken towards setting apart the homestead to the widow, and hence, she took nothing better than a life estate in the lands.—*Hosea v. Davis*, 142 Ala. 211; *Brooks v. Johns*, 119 Ala. 412; *Newell v. Johns*, 128 Ala. 584, and authorities supra. The title being in dispute the court was without jurisdiction to order partition.—*Hillins v. Brinsfield*; 108 Ala. 615; *Sellers v. Friedman*, 100 Ala. 499, and cases cited.

B. T. PHILLIPS, for appellee. The appeal should be dismissed because the transcript was not filed in time.—Sec. 2870, Code 1907. The chancery court has jurisdiction to settle controverted questions of title on partition proceedings.—Sec. 5232, Code 1907. Under the facts in this case, the widow Liza Combs, on the death of the husband, took absolute title to the land in question.—Code of 1896; *Eastman v. Eastman*, 83 Ala. 478; *Wilkin v. Walkers*, 22 South. 476; *Dickinson v. Chap*

[Combs v. Greene, et al.]

man, 52 South. 445; and numerous other authorities. Where the widow of two husbands bears children by each, the children of each husband share alike in her estate, where she takes by virtue of the statute as widow of deceased husband.—*Eastman v. Eastman*, 83 Ala. 478; *Wilkins v. Walker*, 22 South. 476; *Dickinson v. Champion*, 52 South. 445.

MCCLELLAN, J.—Bill Combs died during the year 1906, intestate and owning the fee in, and then residing upon, the 100 acres of land described in the bill. These lands were of a value less than \$2,000, and constituted *all* the lands owned by Bill Combs at the time of his death. Subsequently, in the year 1906, Liza Combs, his widow, died. No minor children, of his union with Liza, survived him. She left six heirs at law, and two of these exhibit this bill against the other four, to effect a sale of the land for division among them under the statutes to that end (Code, § 4231).

The court possessed jurisdiction to determine the controverted question of title raised by the answer.—Code, § 5232. The bill alleges that the six persons mentioned were the joint owners of, or tenants in common in, the lands described therein. The court granted the prayer of the bill, and decreed a sale of the land for division.

According to and by virtue of the statutes in like circumstances, Liza Combs, the widow, became, upon the death of her husband, vested with the absolute fee in the lands described in the bill; and so, notwithstanding there was no proceeding setting apart such lands as the homestead exempted to the widow.—*Faircloth v. Carroll*, 137 Ala. 243, 34 South. 182; *Thacker v. Morris*, 166 Ala. 401, 402, 52 South. 73; *Dickinson v. Champion*, 167 Ala. 613, 52 South. 445; *Hall v. Hall*, 171 Ala. 618, 55

[Mackintosh, et al. v. Stewart.]

South. 146; *Hodges v. Hodges*, 172 Ala. 11, 54 South. 618, among others.

The decree is affirmed.

Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

Mackintosh, et al. v. Stewart.

Bill to Abate Purchase Price and to Enjoin Collection of Note.

(Decided February 6, 1913. Rehearing denied April 23, 1913.
61 South. 956.)

1. *Covenants; Construction*: "Grant, Bargain, Sell and Convey."—Unaided by statute the words, "grant, bargain, sell and convey" operate as a conveyance, but warrant nothing as to title, and the grantee takes only such title, interest or estate as the grantor had at the time the conveyance was executed and delivered.

2. *Same; Seisin*.—An express covenant that the grantor is seised of an indefeasible estate in fee, is a covenant for that complete title which is formed by the union in one person of right and possession.

3. *Same; Breach*.—A covenant that the grantor is seised in fee of an indefeasible estate, is broken as soon as made, if there is an outstanding superior title, or an encumbrance diminishing the value or enjoyment of the land; or generally speaking, if the grantor has not substantially the very estate both in quality and quantity which he professes to convey by the deed.

4. *Same; Implied Covenants; Statute*.—Under section 3421, Code 1907, the covenant of seisin is to be taken subject to the same limitations as the covenants against encumbrances, and hence, implied covenants are limited to the acts of the grantor and those claiming under him, and do not extend to defects of title anterior to the conveyance to him.

5. *Same*.—Covenants of title are always intended to guard against titles adverse to the covenantor, but where they result from the wrongful acts of strangers subsequent to the conveyance, such covenants are not effected.

6. *Same; "Suffered"*.—Under section 3421, Code 1927, an implied covenant of an indefeasible estate in fee for both right and possession, as against any act done or "suffered" by the grantor, is broken by an adverse possession which by limitations has ripened into title at the time of the conveyance, and, since adverse possession does ripen into title, it is to be regarded as an actual estate or interest, and

[Mackintosh, et al. v. Stewart.]

therefore, an encumbrance on the title from the commencement of the covenant. The word "suffered" not being capable of being confined to the voluntary acts of the owner.

7. *Same; Breach; Action for.*—An averment that various persons were in the actual adverse possession of particularly described parts of the land at the time of the conveyance to complainant, without showing when such possession began is a sufficient allegation of the breach, at the moment of conveyance, of the covenant for seisin for both right and possession as against wrong doers implied by section 3421, Code 1907, or of the covenant for seisin in its narrow sense of mere actual possession, and prima facie states a case of the grantee's loss of possession and title through the fault of the grantor.

8. *Same; Presumption; Burden of Proof.*—A grantor conveying with a covenant as implied under section 3421, Code 1907, will be presumed to have had knowledge of the facts and effect of an adverse possession, and because of such presumed knowledge of the title which he undertakes to assure, he has the burden of pleading and proving such fact if such adverse possession has ripened into an indefeasible title before he claimed the land.

9. *Same; Nature of Remedy.*—The remedy on an implied covenant is always administered for the purpose of protecting the vendor from losing both his land and the price, and at the same time securing to the purchaser the full benefit of his contract.

10. *Same; Grantee's Knowledge.*—A grantee's notice or knowledge of an encumbrance or of a paramount title, does not impair his right of recovery upon covenants of warranty which cover known as well as unknown encumbrances or defective titles, however full his knowledge may be; the statute expressly provides that the grantee may assign breaches as if such covenants were expressly inserted.

11. *Same; Recovery; Effect as Rescission.*—A recovery in an action for breach of a covenant for title works a rescission pro tanto by reverting in the covenantor the title which he has conveyed, such as it is.

12. *Champertry and Maintenance; Enforcement by Grantee.*—The express or implied covenants of a deed of land adversely held when conveyed are available to the grantee, notwithstanding the rule against champertuous conveyances.

13. *Contracts; Third Persons.*—The agreement of a bank with a purchaser, after the execution of the mortgage to it, to pay the balance due to the vendor, inured to the benefit of the vendor.

14. *Set-Off and Counter Claim; Equitable; Non-Residence.*—The non-residence of a party against whom a set-off is claimed is of itself ground for equitable relief, allowing the set-off, and also good ground for recoupment.

APPEAL from Mobile Chancery Court.

Heard before Hon. THOMAS H. SMITH.

Bill by D. H. Stewart against James A. Mackintosh, and others, to abate the purchase price of land, and to

[Mackintosh, et al. v. Stewart.]

enjoin a bank from paying certain notes until the matter of the purchase price is determined. From a decree overruling demurrers to the bill respondents appeal. Affirmed.

C. J. TORREY, for appellant. There was no equity in the bill and the demurrers numbered 3, 4, 8 and the additional demurrers should have been sustained.—*Cullum v. Branch Bank*, 4 Ala. 21; *Thompson v. Christian*, 28 Ala. 399; *Tobin v. Bell*, 61 Ala. 125; *Griel v. Lomax*, 86 Ala. 135; *Carrier v. Eastis*, 112 Ala. 474; *Rarden v. Badham*, 142 Ala. 502, and authorities cited. It is clear from these authorities that complainant has no remedy either in law or in equity on the facts stated in his bill. A purchaser in possession under deeds with covenants of warranty cannot maintain a bill to enjoin recovery of the purchase money, and to set off damages resulting from breach of covenants merely because the vendor has no title, or has a defective title.—*Gilham v. Walker*, 135 Ala. 459; *Williams v. Neal*, 152 Ala. 435; *Bell v. Thompson*, 34 Ala. 663; *Nelms v. Pruitt*, 37 Ala. 389; *Holly v. Young*, 27 Ala. 203; *Gipson v. Marquis*, 29 Ala. 668. Counsel discusses the other assignments of error, but without citation of authority.

ERVIN & MCALEER, for appellee. The mere statements of the facts of the bill show that complainant was without an adequate remedy at law.—*Dunn v. White*, 1 Ala. 646; *Cullom v. Branch*, 4 Ala. 31. The fact that the purchaser knew of the adverse holding would be no defense by the grantor in an action on the covenant.—*Copeland v. McAdory*, 100 Ala. 560; *Dunn v. White*, *supra*. As to the measure of damages, see 69 Ala. 502; 59 Ala. 612; 99 Am. Dec. note 78; 24 Am. St. Rep. note 267. Partial failure of consideration will au-

[Mackintosh, et al. v. Stewart.]

thorize recovery.—*Cullom v. Branch Bank, supra*. The failure to deliver possession was a breach of the covenant of seisin contained in section 3421, Code 1907; *Cullom v. Branch Bank, supra*; 35 Cyc. 1371; 16 Cyc. 601; *Roebuck v. Dupuy*, 2 Ala. 537; *Gee v. Phar*, 5 Ala. 587.

SAYRE, J.—The bill shows that Stewart bought a tract of land from Mackintosh, who resides in the state of New Jersey, giving notes for deferred payments. By agreement, Mackintosh's deed was made to Tonsmeire "as trustee," without more to define the trust. There were no express covenants, but the words of conveyance were, "grant, bargain, sell and convey." The City Bank & Trust Company of Mobile had let Stewart have money with which to make a partial payment, and a few days after the deed of trust had been executed Stewart and the bank entered into a formal agreement by which the bank, among other things, agreed to pay the balance due to Mackintosh, looking for reimbursement to the proceeds of sales of the land, which was to be subdivided and sold in lots by Stewart. At the time of these transactions—they were one in effect—strangers were in the adverse possession of parts of the tract claiming to own the same. The purpose of the bill is to have a pro rata abatement of the purchase price on account of those parcels adversely held, and to that end an ancillary prayer is that the bank be enjoined from paying any balance to Mackintosh until the proper amount of the abatement be ascertained; complainant offering to pay that amount when ascertained. The chancellor overruled a demurrer to the bill, and Mackintosh appeals.

Appellant's main contentions are that complainant by his bill shows no wrong, or, if so, that he has an

[Mackintosh, et al. v. Stewart.]

adequate remedy at law; but we, after due consideration, have reached the conclusion that these contentions ought not to be sustained.

Complainant's specifically alleged grievance is that when he took his deed he failed to get actual possession of certain parts of the property bargained for—this because they were at the time in the adverse possession of strangers who still hold them; the averment that this possession has continued down to the time of suit brought being important only as showing that complainant has not as yet had a remedy—and the question is whether he took any assurance for the possession. Unaided by the statute (section 3421 of the Code), the words of the deed to plaintiff, or to Tonsmeire for plaintiff's use and benefit, operated as a conveyance, but warranted nothing as to title. Complainant took only such title, estate, or interest as the vendor had at the moment the conveyance was executed by delivery. It becomes necessary then to consider how the deed is influenced as to its operation and effect by section 3421, which, by the provisional elimination of words and phrases immaterial to the purposes of this case, may be read as follows: In all conveyances of estates in fee, the words "grant," "bargain," "sell," or either of them, must be construed an express covenant to the grantee that the grantor was seised of an indefeasible estate in fee simple, free from incumbrances done or suffered by the grantor. It is uniformly held that the covenant that the grantor is seised of an indefeasible estate in fee, when expressly made, is a covenant for that complete title which is formed by the union in one person of right and possession, and is broken as soon as made, if there is an outstanding superior title, or an incumbrance diminishing the value or enjoyment of the land, or if, in general, the grantor has not substantially the

[Mackintosh, et al. v. Stewart.]

very estate, both in quantity and quality, which he professes by his deed to convey.—*Moore v. Johnston*, 87 Ala. 220, 6 South. 50; *Copeland v. McAdory*, 100 Ala. 553, 13 South. 545. But the implied covenant of the statute is another thing.

This statute, dating back to territorial times in this state, was copied almost literally from a statute of Pennsylvania which antedated the Revolution. It has been substantially enacted in a number of states, and without exception—aside from an apparent dictum in *Funk v. Voneida*, 11 Serg. & R. (Pa.) 111, 14 Am. Dec. 617, referred to in our case of *Roebuck v. Duprey*, 2 Ala. 535, and corrected by the Supreme Court of Pennsylvania in *Knepper v. Kurtz*, 58 Pa. 484—Chief Justice Tilghman's exposition of the true meaning and effect of the statute in *Grantz v. Ewalt*, 2 Bin. (Pa.) 95, has been followed.—*Roebuck v. Duprey*, *supra*; *Griffin v. Reynolds*, 17 Ala. 198; *Parker v. Parker*, 93 Ala. 80, 9 South. 426; *Heflin v. Phillips*, 96 Ala. 561, 11 South. 729; *Douglass v. Lewis*, 131 U. S. 75, 9 Sup. Ct. 634, 33 L. Ed. 53; Rawle on Covenants, § 285 et seq.; 8 Am. & Eng. Encyc. 79, note 3; 11 Cyc. 1047, note 31, where the cases are collated. All the authorities hold that the covenants implied by the statute are limited to the acts of the grantor and those claiming under him, and do not extend to defects of title anterior to the conveyance to him. For more pointed answer to the specific argument which appellee has based upon the frame of the statute, we quote from Rawle on Covenants for Title: "The construction of the statute was carefully considered [in *Gratz v. Ewalt*, *supra*], and it was held that the first covenant [that the grantor was seised of an indefeasible estate in fee simple], which standing by itself would be unlimited, must be taken in connection with the subsequent one against incumbrances which is limited, and

[Mackintosh, et al. v. Stewart.]

consequently that none of the covenants implied by the statute were to be construed as extending beyond the acts of the covenantor; and the construction thus given has never been departed from in Pennsylvania; and it is said by Chancellor Kent (4 Kent's Com. 474) that by the decisions in *Gratz v. Ewalt* the words of the statute are divested of all dangerous tendency, and that it will equally apply to the same statutory language in other states."—Section 285. In conclusion on this point, the construction of the statute to the general effect that the first covenant must be taken subject to the same limitations as the second has been too long followed here and elsewhere, and the statute itself, with this construction on it, has been too often re-enacted in the various codifications of the laws of this state, to be now brought into question; and, but for the earnest insistence of counsel for appellee to the contrary notwithstanding our cases, we would have been content in the beginning to say with Dargan, C. J., in *Griffin v. Reynolds*, *supra*, that we considered it the settled law. We have undertaken only to show how generally the construction of our cases is followed.

On the other hand, appellant urges that the authorities to which we have referred conclude the case in his favor. Difficulties arise in any view, but our best judgment is that the implied covenant of the statute means something more than appellant's contention would concede. The covenant is for an indefeasible estate in fee, for both right and possession, as against any act done or suffered by the grantor. The covenants of a deed of land adversely held are available to the grantee, and this was always so notwithstanding the rule against champertous conveyances (*Abernathy v. Boazman*, 24 Ala. 189, 60 Am. Dec. 459) which obtained until recently in this state. The fact of such possession and its

[Mackintosh, et al. v. Stewart.]

duration are important elements in determining the question of a breach of the covenants for a complete title. Where the hostile possession has ripened into an indefeasible title, under the operation of the statute of limitations, it is obvious that the covenant for seisin is broken.—*Wilson v. Forbes*, 13 N. C. 30; *Rawle on Covenants* (5th Ed.) § 54. And since adverse possession, enduring for the statutory period of limitation, will ripen into title, no sufficient reason appears why such possession should not be regarded as an actual estate or interest, and therefore as an incumbrance upon the title, from the moment of its commencement. Covenants for title are always intended to guard against titles adverse to the covenantor's although they may result from the wrongful acts of strangers. A different question would be presented by the case of interruptions subsequent to the conveyance, by persons not claiming lawfully. Against them no covenant is intended to protect. But an adverse possession held at the time of a conveyance is a charge upon the property—at all events, an ejectment is necessary to dispossess the wrongful holder. Its presence is therefore a breach of the covenant for an indefeasible fee.—*Sugden on Vendors* (14th Ed.) 601.

The word "suffered," used in the statute, implies that its influence is not to be confined to the voluntary acts of the grantor, and in Pennsylvania it is held that the grantor is liable on his statutory covenant where a judgment lien has been fastened on the land by adversary proceedings, and that the statute extends to the case of a municipal assessment for local improvement during his title, though there was no personal liability.—*Shaffer v. Greer*, 87 Pa. 370. It would seem that the same principle ought to reach the case of an adverse possession suffered by the grantor, and it will be noted that

[Mackintosh, et al. v. Stewart.]

the cases heretofore have not dealt with the question of an adverse possession as affecting the statutory covenant. In all of them it appears that the grantee received possession with his deed.

The gist of the averment as to a breach is that various persons were in the adverse possession of particularly described parts of the land at the time of the conveyance to complainant. It is not made to appear when these possessions began, and it is insisted that the bill, construed against the pleader, is faulty in failing to show that these strangers went into possession while the grantor was the owner, and hence that they do not appear to have been suffered by the grantor. It is a possession taken and held under claim of title, not a mere intrusion, which will affect title. The complaint is of an adverse possession held at the time of the conveyance. This averment, with whatever strictness construed, makes the case of a breach of the implied covenant for seisin as against wrongdoers at the moment of conveyance, of the covenant for seisin in its narrow sense of mere actual possession, a possession complainant was entitled to have for whatever advantage it might afford him. And, *prima facie*, it makes the case of grantee's loss of possession and title by grantor's fault, for since the latter has according to the measure of the statute assumed to contract for the soundness of the title he undertakes to convey, it must be presumed the fact and the effect of the adverse possession is peculiarly within his knowledge. The consequences in the two cases are the same, the remedy on the covenant being always administered with the purpose, while securing to the purchaser the full benefit of his contract, to protect the vendor as far as practicable from losing both the land and its price. A recovery in an action on the covenant works a rescission—in this case a *pro tanto* rescission—by re-

[Mackintosh, et al. v. Stewart.]

vesting in the covenantor the title, such as it is, which he has conveyed. And because also of grantor's presumed knowledge of the title which he undertakes to assure, if the adverse possession has been so timed as to its beginning and has endured so long as to take it without the implied covenant—that is, had ripened into an indefeasible title before Mackintosh laid claim to the land—the averments of the bill put upon him the burden of pleading and proving the fact.—*Copeland v. McAdory, supra*.

It is not made to appear whether complainant had notice of the various adverse possessions averred in the bill; but his knowledge, if assumed, would be of no consequence, for “knowledge, or notice, however full, of an incumbrance, or of a paramount title, does not impair the right of recovery upon covenants of warranty. The covenants are taken for protection and indemnity against known and unknown incumbrances or defects of title.”—*Copeland v. McAdory, supra*. And the provision of the statute is that the grantee “may, in any action, assign breaches as if such covenants were expressly inserted.”

The bank has assumed to pay the balance of the purchase money. This promise inured to the benefit of Mackintosh. The bank may not be inclined to deny voluntarily any demand upon it for payment, or to submit to the expense and inconvenience of a suit by Mackintosh. In any event, complainant's only assured safety is to have his set-off allowed. It is now settled by a strong preponderance of authority that the nonresidence of a party against whom a set-off is claimed is of itself good ground for equitable relief allowing the set-off. So of recoupment even.—*Porter v. Roscman*, 165 Ind. 255, 74 N. E. 1105, 112 Am. St. Rep. 222, 6 Ann. Cas. 718, and authorities collected in the note.

[Daughdrill v. Lockhart.]

We have said enough to indicate our views on all phases of the question as presented by the demurrer and the assignments of error. Our opinion is that the decree of the court below should be affirmed.

Affirmed.

DOWDELL, C. J., and MCCLELLAN and SOMERVILLE, JJ., concur.

Daughdrill v. Lockhart.

Bill to Enforce Vendor's Lien.

(Decided April 17, 1913. Rehearing denied May 8, 1913.
61 South. 802.)

1. *Equity; Submission; Pleadings As Evidence.*—Where the complainant submitted on the bill and the admissions contained in the answer, and in the answers to interrogatories propounded by the bill, respondent was entitled to have the entire answer introduced in evidence.

2. *Vendor and Purchaser; Cash; Purchase Price; Unpaid Balance; Burden.*—Where a testatrix sold and conveyed land by deed reciting that in consideration of the assumption by the grantee of a mortgage indebtedness, and \$1,800, "to the grantor in hand paid by the grantee" the deed indicated a cash transaction, and in a suit to fix the vendor's lien on the land as to the \$1,800, the burden was on complainant to prove that the same was not paid, and that the transaction was in fact a sale on credit.

3. *Deeds; Delivery; Date; Presumptions.*—In the absence of evidence showing the actual date of the delivery of the deed, the legal presumption is that it was delivered on the day of its date and acknowledgment.

APPEAL from Perry Chancery Court.

Heard before Hon. THOMAS H. SMITH.

Bill by T. T. Daughdrill as executor, etc., against J. E. Lockhart to enforce a vendor's lien. Decree for respondent and complainant appeals. Affirmed.

CLIFTON C. JOHNSON, for appellant. The admissions of the answer would be considered by the court without

[Daughdrill v. Lockhart.]

any formal offer by complainant.—*McGhee v. Lehman*, 65 Ala. 316; *Thorington v. City Council*, 88 Ala. 551. The mere fact that plaintiff called the attention of the court to the admissions in the answer did not authorize respondent to offer the answer as a whole.—*Marks v. Cowles*, 61 Ala. 299; *Buchanan v. Buchanan*, 72 Ala. 55; sec. 3096, Code 1907. The defense set up by the answer was affirmative—that of payment—and the burden of proof was on the respondent.—*Wolff v. Nall*, 62 Ala. 24; *Lehman v. McQueen*, 65 Ala. 570; *Holmes v. State*, 100 Ala. 291. The prima facie date of execution and delivery is that shown in the deed in the absence of evidence showing to the contrary.—*Williams v. Armstrong*, 130 Ala. 389; *Fitzpatrick v. Brigman*, 130 Ala. 450. Therefore, the deed would be evidence of payment only at or prior to that time.—*Enc. of Evid.* p. 925; *Neal v. Boggan*, 97 Ala. 611; *Blackshear v. Burke*, 74 Ala. 239.

W. M. FOWLKES, and PETTUS, FULLER & LAPSLEY, for appellee. Where a case is heard on the bill and answer alone, the answer must be taken as true.—*Latham v. Staples*, 46 Ala. 462; *Winters' Case*, 83 Ala. 589; *Scott v. Brassell*, 132 Ala. 663. When so taken the complainant failed to support his bill, and the chancellor properly dismissed it.

DE GRAFFENRIED, J.—We will treat this proceeding as a submission by a complainant of his cause for final decree upon the bill of complaint and the answer to the bill of complaint. The complainant in his bill of complaint waived answer under oath, and the answer was not sworn to. The complainant submitted his cause upon his bill and the following testimony, viz.: "The admissions contained in the answers of the re-

[Daughdrill v. Lockhart.]

spondent to the bill of complaint and his admissions contained in his answers to interrogatories propounded in the bill of complaint and incorporated in said answers as a part thereof." The respondent thereupon, against the objection of the complainant, offered the entire answer which had been filed by him in the cause as evidence in the cause. "The answers of the defendants are but the confessions of the defendants. If the complainants choose to rely upon these confessions, they must be taken, as other confessions, altogether as a whole."—*Crawford v. Kirksey*, 50 Ala. 590. If the complainant saw proper to avail himself of a part of what the respondent said in his answer, and to introduce that part as evidence in his behalf, certainly the respondent was entitled to have his entire answer introduced in evidence. It is a familiar proposition that when a party to a controversy introduces in evidence a part of a statement of his adversary, then the party against whom such part of the statement is introduced is entitled to introduce all of such statement. Otherwise a statement which, when taken and considered as a whole, was altogether harmless or unhelpful to the party making it might be so garbled and twisted out of its true meaning as to render it dangerous and hurtful. The rules of practice of all courts are intended to be perfectly fair to all parties.

1. The complainant in his bill alleges that the respondent purchased from his testatrix a certain tract of land in Perry county, Ala., that respondent, as a part of the purchase money, assumed to pay, and afterwards did pay, a certain mortgage indebtedness then existing on the said land, and that, in addition to said mortgage indebtedness, he was to pay to his said testatrix the sum of \$1,800 in cash. The bill of complaint has attached to it a copy of the deed which was made

[Daughdrill v. Lockhart.]

by the complainant's testatrix to the respondent. In the deed the complainant's testatrix is described as a widow residing in Perry county, Ala., and the respondent is described as a resident of Pontotoc county, Miss. The deed recites that in consideration of the assumption of said mortgage indebtedness by the grantee, "as well as the sum of one thousand, eight hundred dollars to the grantor in hand paid by the grantee," the said grantor grants, bargains, sells, and conveys the said land to the said grantee. The deed, therefore, shows that the transaction had between the complainant's testatrix and the respondent was a cash transaction.

The complainant in his bill of complaint does indeed allege that the said \$1,800 was never paid by the respondent to the complainant's testatrix, but this allegation of the bill of complaint does not shift, in this case and in this transaction, the burden of proof from the complainant to the respondent to show that said sum had not, in fact, been paid by the respondent to complainant's intestate. This transaction between complainant's testatrix and respondent was a cash transaction, and there is nothing surrounding the transaction itself indicating that the lands were sold on credit, or that any credit was in fact extended. The complainant in his bill of complaint alleges that the sale of the land by his testatrix was not what it professed to be viz., a cash sale; and, as he makes this allegation, the law casts upon him the burden of showing that the sale was not a sale for cash, but a sale on credit.

In *Cook v. Malone*, 128 Ala. 662, 29 South. 653, defendants brought a cross-action for the price of six bales of cotton. The court instructed the jury that the burden of proof was on the defendants (cross-plaintiffs) to show that plaintiffs (cross-defendants) had bought the cotton and had not paid for it. This

[Daughdrill v. Lockhart.]

court said: "It is here insisted for defendants that the charge violated the rule stated generally in 3 Brick. Dig. 698, §§ 1, 2, and applied to a cross-action of set-off in *Snodgrass v. Caldwell*, 90 Ala. 319, 7 South. 834, which subjects the party relying on the defense of payment to the burden of proof. That rule is applicable only where the issue is whether an indebtedness assumed to have been in existence has been discharged by payment. In this case the payment the plaintiff sought to prove was not of a debt, but was one occurring in the consummation of a cash purchase. A sale wherein no credit is either expressly or impliedly given, but which is strictly for cash, is not consummated until the consideration is paid.—1 Benj. on Sales, § 335 et seq.; *Shines v. Steiner*, 76 Ala. 458; *Blackshear v. Burke*, 74 Ala. 239. In such a sale payment concurs with the passing of ownership in the property, so that no indebtedness for the price can intervene."—*Pollak v. Winter*, 173 Ala. 550, 55 South. 828.

2. The deed, a copy of which is attached to the bill of complaint, recites that the grantor resided in Perry county, Ala., and the grantee in Pontotoc county, Miss. The deed is dated January 8, 1907, and was acknowledged by the grantee on that date. Unless there is evidence tending to show the actual date of delivery, the law presumes that a deed was delivered on the day of its date and acknowledgment.—*Williams v. Armstrong*, 130 Ala. 389, 30 South. 553. This presumption is merely a legal one and is, as stated, only indulged in the absence of evidence tending to show the actual date of the delivery. The law also presumes that in a cash sale of land the purchase money was paid when the deed was actually delivered; i. e., when the title to the land passed from the grantor to the grantee.—*Cook v. Malone*, *supra*. We can, therefore, see nothing which is help-

[Daughdrill v. Lockhart.]

ful to complainant in the statement in the respondent's answer—made in response to an interrogatory contained in the bill of complaint calling upon the respondent to disclose when and how he paid the \$1,800—that the money was paid by a check dated January 11, 1907, drawn by respondent on a certain bank in Pototoc, Miss., and which check was paid by said bank.

In construing pleadings we must do so in the light of human experience and in the ordinary knowledge of business transactions, and we can find nothing in the defendant's above statement or in any other part of his answer indicating that his transaction with the complainant's intestate was not, even to its very letter, what it purported to be, a cash transaction.

The answer of the respondent, when fairly construed, was a distinct and positive traverse of the material allegations of the bill of complaint, and as the complainant offered no evidence to sustain the allegations of his bill of complaint, the chancellor properly dismissed the complainant's bill of complaint.—*Winter's Case*, 83 Ala. 589, 3 South. 235.

The decree of the court below is affirmed.

Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

[Moore, et al. v. Empire Land Co.]

Moore, et al. v. Empire Land Co.*Bill to Quiet Title.*

(Decided January 23, 1913. Rehearing denied April 23, 1913.
61 South. 940.)

1. *Quieting Title; Constructive Possession; Minerals.*—Where the owner conveyed the surface rights to certain land, reserving the minerals, and the grantee went into possession of the surface, and he and his grantees, including complainant had remained in possession since 1874, no one having any separate actual possession of the minerals, the possession of the minerals accompanied the possession of the surface and complainant having acquired title to the minerals by adverse possession, was in the constructive possession thereof, and entitled to file a bill to quiet title to the minerals.

2. *Same; Grounds; Fraud.*—A complainant in a bill to quiet title cannot raise the issue that the interest of the respondents was acquired from the heirs of the original holder by fraud.

3. *Property; Title; Constructive Possession.*—In the absence of an actual possession in another, title to land always gives constructive possession to the holder thereof.

4. *Equity; Pleading; Multifariousness.*—Under section 3095, Code 1907, a bill seeking the cancellation of a deed as a cloud upon title, and charging it to have been obtained by fraud, and in violation of the duty of an agent, and asking that a trust be declared for the benefit of the complainant is not multifarious.

5. *Same; General Demurrer; Bill Good in Part.*—A bill seeking both to have title quieted and to have a trust declared in the same land, which is good as a bill to quiet title, is not subject to a general demurrer for want of equity, regardless of whether it is sufficient as a bill to declare a trust.

6. *Same; Parties; Joinder.*—Where the bill alleges that all of the parties respondent claim or are reputed to claim an interest in the land jointly, there is no misjoinder.

7. *Same; Fraud; Joint Participants.*—In a bill charging fraud and breach of trust, parties who are alleged to have participated in the transaction are proper, if not necessary parties to the bill.

8. *Abstractors; Purchase of Adverse Interest.*—An abstractor is not the agent of a purchaser in such sense as to preclude him from purchasing from the true owner a right in premises for which he had furnished the purchaser an abstract of title correctly showing the outstanding right which the abstractor subsequently purchased.

APPEAL from Walker Circuit Court.

Heard before Hon. J. J. CURTIS.

[Moore, et al. v. Empire Land Co.]

Bill by the Empire Land Company against J. S. Moore and others, to quiet title to land, and for other relief. From a decree for complainants, respondents appeal. Affirmed in part, and in part reversed and remanded.

JAMES J. RAY, for appellant. Objections for misjoinder may be made at the hearing, or by the court *ex mero motu* on error.—*Langley v. Andrews*, 132 Ala. 147; *Carwile v. Crump*, 165 Ala. 206; 57 Ala. 28. As a rule the record must show a responsible interest in every respondent.—16 Enc. P. & P. 590; 30 Cyc. 125. Parties as to whom no decree can be rendered on the hearing ought not to be made parties respondent or complainant.—*Jones v. Caldwell*, 116 Ala. 367. The bill was not good as a bill to quiet title, as the allegation of possession was inconsistent with and repugnant to the facts stated.—*Galloway v. Hendon*, 131 Ala. 280; *Smith v. Gordon*, 136 Ala. 498; 28 A. & E. Enc. of Law, 239. A grantee must be named in a deed or must be so described that he can be distinguished from other persons.—*Jones v. Morris*, 61 Ala. 521. The deed conveyed no legal title.—*Wallace v. Hodges*, 160 Ala. 276; *Dixon v. Van Hoose*, 157 Ala. 459; *Whittaker v. Miller*, 83 Ill. 381.

R. W. STOUTZ, and DAVIS & FITE, for appellee. Under the case of *Black Warrior C. Co. v. West*, 54 South. 200, the title to the minerals ripened in to a title in complainant. There was no misjoinder of parties.—Sec. 5443-4, Code 1907; 32 Cyc. 1348; 6 Pom. 739; *Johnson v. Little*, 141 Ala. 382; *Davis v. Denham*, 145 Ala. 245. The bill was not multifarious.—*Exchange Bank v. Stewart*, 158 Ala. 218; *Worthington v. Miller*, 134 Ala. 420; *Hill v. Moore*, 104 Ala. 353; *Reddick v. Long*, 124 Ala.

[Moore, et al. v. Empire Land Co.]

260. Brotherton and Gamble as abstractors are held to the same measure of fidelity as trustees analogous to the duty of attorneys.—1 Cyc. 214; 31 Cyc. 1445; 1 A. & E. Enc. of Law, 220 and 1085; 3 Am. St. Rep. 502; 80 N. W. 992; 100 Am. Dec. 304. This right to assert the right of a principal against the agent inures to the vendee of the principal.—*Fowler v. Ala. S. & I. Co.*, 164 Ala. 414.

ANDERSON, J.—The statute requires that a complainant, in order to maintain a bill thereunder to quiet title, must be in the possession of the land, actual or constructive, and while the present bill does not aver an actual possession, it does set up a constructive possession. Therefore the question that arises is whether or not the facts set up in said bill refute the claim of constructive possession, or are sufficient to show that the complainant did have the constructive possession when the bill was filed.

Title to land always gives constructive possession to the holder thereof, in the absence of the actual possession in another, and this complainant claims title to the mineral interest in the land in question, and constructive possession thereof by virtue of its said title. It seems that the remote grantor of the appellee, H. A. Key, went into possession of the land under color of title in 1867, and held same until 1874, when he conveyed the surface to another, and that the said grantee, and his successive grantees, have ever since been in the actual possession of the surface, with no one in the actual possession of the mineral. It would therefore seem that notwithstanding H. A. Key, in 1874, conveyed the surface, separate and apart from the mineral right, that this, as a severance, was a mere legal fiction, and in the absence of an actual physical possession of the mineral

[Moore, et al. v. Empire Land Co.]

interest, distinct from the possession of the surface, did not operate to sever the possession of the mineral right from the one being held by the possessor of the surface. In other words, in the absence of a physical severance, the possession of the mineral right went with and followed the possession of the surface, and the holder of the surface, if the grantor of the mineral right, held for the benefit of his grantee of said mineral right; or if the holder of the surface was the grantee of the surface right, then he held the possession of the mineral right for the benefit of his grantor of the surface right, but who reserved the mineral right. This is the effect of the holding in the case of *Black Warrior Co. v. West*, 170 Ala. 346, 54 South. 200, and while there was division among the members of the court, the opinion of the majority must be, and is, accepted as the law. We therefore hold that the complainant has made out, under the averments of its bill, a title to the minerals by adverse possession, and which gives it the constructive possession of same.

The bill not only seeks a cancellation of the deed as a cloud upon complainant's title, but further charges that the deed acquired by Moore was in pursuance of a fraudulent conspiracy, and in violation of the duty of agent to principal, and upon false representations that the deed was being procured for this complainant, and asks that a trust be declared and that the complainant be entitle to the benefit of said purchase. Whether the bill be in the alternative or the relief be inconsistent, it relates to the same subject-matter or property, and is not multifarious under the terms of section 3095 of the Code of 1907.—*Durr v. Hanover Bank*, 170 Ala. 260, 53 South. 1012.

The bill is sufficient as a bill to quiet title under the statute, independent of the last phase of same, and the

[Moore, et al. v. Empire Land Co.]

general demurrer for want of equity was properly overruled.

We think that the bill utterly fails to make out a case which would cause the purchase of Moore from the Key heirs to inure to the benefit of this complainant. We do not gather from the averment that a breach of trust or fidelity has been committed, on the part of Gamble and Brotherton, as to this complainant, and the attempt to charge same is very remote and farfetched. It is questionable as to whether or not they occupied any fiduciary relationship with the Gulf Company, certainly none with this complainant. The Gulf Company employed Bankhead, an attorney, to abstract and pass upon its title to certain lands, not these respondents or the abstract company, and Bankhead employed the abstract company to furnish an abstract, and which seems to have been correct. There was no misrepresentation or concealment of any fact on the part of the abstract company, or by Bankhead, who pointed out in his report the infirmity of the first Key deed, and which seems not to have deterred the present complainant from purchasing the property. It would be a monstrous expansion of the rule, against agents and attorneys, to hold that the abstractor of a title was forever forbidden from purchasing property from the true owner because at some time he furnished a correct abstract of the title to some claimant thereto.

The complainant attempts to strengthen its far-fetched charge of bad faith and breach of trust by a further averment that these parties misrepresented the facts when getting the deeds from the Key heirs. If this was true, then the Key heirs are the ones to seek relief, and not this complainant, and the bill was subject to the fourteenth ground of demurrer, which should have been sustained.

[Vizard v. Robinson.]

The bill charges that Gamble and Brotherton claim or are reputed to claim an interest in the land jointly with Moore and was not subject to demurrer for improper parties. Moreover, if they disclaim any interest or title to the land, they are discharged without cost.—Section 5448 of the Code.

Then, too, with the second phase of the bill in the case, charging fraud and a breach of trust, Gamble and Brotherton were at least proper, if not necessary, parties.

The decree of the court below is affirmed in part, and is reversed and remanded in part, with the cost of this appeal equally divided between the complainant and the respondents.

Affirmed in part and reversed and remanded.

DOWDELL, C. J., and MAYFIELD and DE GRAFFENRIED, JJ., concur.

Vizard v. Robinson.

Bill to Quiet Title to Timber.

(Decided April 8, 1913. 61 South. 959.)

1. *Acknowledgment; Defective; Direct Attack.*—An attack on a timber deed for alleged disqualification of the officer to take the acknowledgment of the parties is direct, and not collateral.

2. *Same; Deed; Effect.*—An efficacious acknowledgment of the deed not only renders it self-proving when seasonably recorded, but imports a verity against which none can complain except for duress or fraud.

3. *Same; Officers; Disqualification; Interest.*—Where an attorney who was also a notary public was employed to purchase standing timber interest, and was paid a specific price per acre for his services, he could not be said to have an interest in the conveyance of the timber so purchased, but an interest only in the transaction, and hence, was not disqualified to take the acknowledgment of the grantors in the deed.

4. *Logs and Logging; Conveyance of Standing Timber; Limitations.*—The deed considered, and it is held to convey an absolute title to

[Vizard v. Robinson.]

the timber, and that the limitations therein contained only applied to the grantee's rights under the deed to enter the land and construct and operate tram roads to remove that or other timber.

5. *Deeds; Bargain and Sale; Construction.*—A deed of bargain and sale for a valuable consideration is construed most strongly against the grantor, and, if it contains conflicting parts, all reasonable effort should be exerted to reconcile it, and if there is an utter inconsistency between the two clauses the last clause must give way to the first.

6. *Evidence; Parol; Deeds.*—Where a deed of bargain and sale conveyed an absolute title to the timber on certain lands described, parol evidence was not admissible to show that, at the time of the sale, it was verbally agreed that the grantee's title to the timber was limited to eight years from the date of the deed, and that at the expiration of that time, all the grantee's interest in the timber was forfeited to the grantor.

APPEAL from Coosa Chancery Court.

Heard before Hon. W. W. WHITESIDE.

Bill by Allen Robinson against Anthony Vizard to quiet title to timber interest in land. Decree for complainant, and respondent appeals. Reversed.

The deed mentioned in the opinion is as follows: "That for and in consideration of the sum of \$200.00 to the undersigned Allen Robinson and wife, M. S. Robinson, in hand paid by William Cooper, we, the said Allen Robinson and wife, M. S. Robinson, do hereby grant, bargain, sell and convey unto the said William Cooper, the following described real estate, to wit: All of the timber of every kind which measures as much as 10 inches at the stump, situated and standing on the following described land: [Here follows the description.] Together with the right to go upon and across the said land for the purpose of removing said timber therefrom, and also the exclusive right to build and construct tram-roads or other roads on or across said land, for the purpose of removing said timber, or any other timber of the said W. M. Cooper. That the rights above conveyed shall continue for a period of eight years from date of this instrument, and no longer." Then follows the ordinary covenants of seisin, right to convey, and warran-

[Vizard v. Robinson.]

ty. This deed was dated March 23, 1903. The bill alleges the conveyance from Cooper to the Vizard Investment Company, and from the Vizard Investment Company to Anthony Vizard, and the prayer seeks to declare the claim, interest, and title of said Anthony Vizard in and to the timber growing on said land to be void and of no effect and removed as a cloud on orator's title. He also seeks to declare other deeds void and of no effect, and to remove them as cloud on title.

STEVENS, LYONS & DEAN, for appellant. The deed conveyed the legal title to the timber, and the provisions as to time of removal are not conditions subsequent, but are covenants that the timber will be cut within the time mentioned.—*Zimmerman Mfg. Co. v. Daffin*, 149 Ala. 388. The deed conveys, first, the timber, second, the right to go on the land to remove it, and third, the exclusive right to build and construct a tramway, and the chancellor erred in attempting to distinguish the several rights as meaning different privileges.—*Sutherland on Statutory Construction*, sec. 255. Evidence as to an understanding as to time of removal not stated in the deed was inadmissible.—3 Mayf. Dig. 565. The notary had no such interest in the land, as would render him disqualified to take the acknowledgment of the grantor to the deeds conveying the same.—*Austin v. B. & L. Assn.*, 50 S. E. 382; *Sloss v. B. & L. Assn.*, 23 S. E. 847; 1 Cyc. 555; 1 Devlin on Deeds, sec. 477-a. In any event, the deed would be voidable only and not void.—*Monroe v. Arthur*, 126 Ala. 362; *Fearin v. Berne*, 129 Ala. 435; *Farmers' Assn. v. Greenwood*, 137 Ala. 257. Such an instrument on record protects bona fide purchasers for value who become such while such conditions exist.—1 Devlin sec. 477; 1 Cyc. 530-553; 92 Pac. 628; 47 N. W. 449. No offer to do equity is made, and this is es-

[Vizard v. Robinson.]

sential to one who seeks to rescind.—*Grider v. Mortgage Co.*, 94 Ala. 291; *Hayes v. B. & L. Assn.*, 124 Ala. 668.

GEORGE A. SORREL, for appellee. The condition expressed in the deed was notice to Vizard of the condition upon which title passed, and he was charged with notice from the face of the deed that the timber was to be removed in eight years.—*Webb v. Robbins*, 77 Ala. 83; *Gilmer's Case*, 79 Ala. 569; *Elyton L. Co. Case*, 100 Ala. 396. While conditions subsequent are not favored in law, yet if the attending circumstances, and the conveyance show clearly a condition subsequent, such condition is operative and works a forfeiture.—*Elyton L. Co. v. S. & M. A. R. R. Co.*, 100 Ala. 396. The clause found in the deed is clearly a limitation of title acquired under such conveyance by the grantee. An acknowledgment taken by a notary public is a judicial act.—*Grider v. A. & F. M. Co.*, 99 Ala. 281; *Byrd v. Bailey*, 169 Ala. 454. The attorney was an interested party and cannot be permitted to take the acknowledgment.—*Hayes v. B. & L. Assn.*, 124 Ala. 663; *Morris v. Bank of Attalla*, 153 Ala. 352; *Byrd v. Bailey, supra*; 89 Am. St. 330.

MCCLELLAN, J.—Bill to quiet title, with particular reference to the timber interest therein.—Code, § 5443 et seq. There are two major questions presented for review: First, whether an officer concerned as will be later stated, is competent to take an acknowledgement of a conveyance of an interest in land occupied as a homestead by the grantor and his wife; second, whether the deed, which (omitting the calls of the land) the reporter will set out, expressed a *limitation* upon the estate granted, or a covenant merely.

As respects the validity vel non of the instrument, as that question is affected by the alleged want of compe-

[Vizard v. Robinson.]

tency of the officer to take the acknowledgment of the parties, the attack here made is direct, not collateral.—*Hayes v. B. & L. Asso.*, 124 Ala. 663, 26 South. 527, 82 Am. St. Rep. 216; *Monroe v. Arthur*, 126 Ala. 362, 28 South. 476, 85 Am. St. Rep. 36; *National B. & L. Asso. v. Cunningham*, 130 Ala. 539, 30 South. 335

These propositions are settled in this state: "An efficacious acknowledgment not only renders the instrument self-proving, if seasonably recorded, but it imports a verity against which none can * * * complain, unless it is for duress or fraud. It is a quasi judicial, if not judicial, act of an officer, and his certificate cannot be questioned, if his jurisdiction was obtained, except on the grounds stated."—*Morris v. Bank of Attalla*, 153 Ala. 352, 357, 45 South. 219, 221; *Chattanooga Nat. B. & L. Asso. v. Vaught*, 143 Ala. 389, 39 South. 215; *Sellers v. Grace*, 150 Ala. 181, 43 South. 716; *Griffith v. Ventress*, 91 Ala. 366, 374, 375, 8 South. 312, 11 L. R. A. 193, 24 Am. Rep. 918; *Amer. Mtg. Co. v. Thornton*, 108 Ala. 258, 19 South. 529, 54 Am. St. Rep. 148; *Alford v. First National Bank*, 156 Ala. 438, 47 South. 230, 22 L. R. A. (N. S.) 216.

In *Hayes v. Sou. Home B. & L. Assn.*, 124 Ala. 663, 667, 26 South. 527, 530 (82 Am. St. Rep. 216), it was ruled that the public policy involved refutes the competency of an office "financially interested in the conveyance" to take and certify an acknowledgment, and that the doctrine has a peculiar force in its application to cases where the title to the homestead is to be affected and the certification of the *separate* acknowledgment of the wife, in a particular way and form, is a condition precedent to the transmission of interests under the conveyance. The doctrine was recently reiterated in *Byrd v. Bailey*, 169 Ala. 452, 53 South. 773, Ann. Cas. 1912B, 331.

[Vizard v. Robinson.]

Robinson (appellee) was the owner in fee of the lands which were his homestead; Cooper, appellant's predecessor in asserted right, was the grantee in the conveyance.

Paragraph 8 of the bill, the only section particularly necessary to be considered in this connection, is as follows:

"Your orator would further show unto your honor that on the 23d day of March, 1903, E. V. Jones, the notary public before whom your orator and his wife, M. F. Robinson, acknowledged said conveyance as shown by Exhibit A hereto attached was an attorney at law, practicing law at Rockford, in Coosa county, Ala., and on said date and at the time said conveyance was acknowledged by your orator and his wife, M. S. Robinson, before the said E. V. Jones, he was the attorney for and the agent of said W. M. Cooper, the grantee in said conveyance, and as such attorney and agent negotiated and perfected the sale of said timber by your orator to the said W. M. Cooper and was the active agent, acting for and in behalf of said W. M. Cooper, who bought said timber from your orator and prepared the conveyance above described from your orator to said W. M. Cooper and was the paid agent and attorney for the said W. M. Cooper to purchase for the said W. M. Cooper the said timber from your orator, and obtained from your orator a conveyance to the same.

"Your orator would further state, charge, and aver that the said deed conveying to the said W. M. Cooper the said timber, being thus acknowledged before the said E. V. Jones, who was then and there the active agent, attorney for said W. M. Cooper, and made said contract of purchase with your orator for the said Cooper, was and is void and of no effect and is insufficient in law to pass any title out of your orator into the said W. M. Cooper; and your orator further charges

[Vizard v. Robinson.]

and avers that, the said conveyance being void, the said W. M. Cooper, Vizard Investment Company, nor the respondent, Anthony Vizard, has ever obtained any right, title, or interest in or to said timber; he is claiming openly, notoriously to own said timber, which claim of the respondent is a cloud on the title of your orator to his said land and is doing a great injustice."

The agreed statement of facts on this point contains this:

"(1) That at the time that the sale and purchase evidenced by the timber deed, which is an exhibit to the original bill in this cause, was being negotiated, and at the time of the execution of the said deed, it was verbally agreed between the vendors and vendee that the right and title to said timber so conveyed by said deed was to last for a period of eight years from the date of said deed, and that at the expiration of said eight years, if the timber was not cut and removed from said land, all right to the same was forfeited as to the buyer, and the same reverted to and was the property of the seller after the expiration of said term of eight years; that said agreement should be evidenced by writing in the said deed, the provision there appearing which reads as follows: 'That the rights above conveyed shall continue for a period of eight years from the date of this instrument, and no longer.'

"(2) That, at the time E. V. Jones took the acknowledgment of the vendors that they executed said deed, M. S. Robinson was the wife of Allen Robinson, and they were living on and occupying as a homestead the land described in the original bill as being in section 21; that at said time the said E. V. Jones was the agent and attorney for the vendee to make contracts of purchase of timber for him in Coosa county, Ala., including the contract and purchase as shown by the deed

[Vizard v. Robinson.]

above referred to; that it was a part of his contract to purchase timber, obtain a deed from the seller to the buyer, and pass on the title to said land so conveyed; that the vendee paid said Jones for this service so much per acre for all the timber so bought; that Jones was paid a certain price per acre by the buyer for buying this timber."

The weight of authority beyond this jurisdiction, rested, we think, on sound reason, is that one who is agent and attorney, or either, of a party to a transaction, engaged to render service as agent or attorney, or both, in the negotiations about or in completion of the transaction, is not thereby disqualified or rendered incompetent to take and certify the acknowledgment of a conveyance, even of the homestead, in perfection of the agreement to which he is so related as agent and attorney, or either, unless he has a "financial interest in the conveyance."—1 Ency. L. & P. pp. 865, 866, and notes collating the decisions. Such is the result of our case of *Hayes v. Sou. Home B. & L. Assn.*, *supra*.

The case made in this aspect, by the averments of the bill or the agreed statement, or both, fails to show that Jones the agent and attorney, or either, had any "financial interest in the conveyance"; the facts set forth evidencing at most a financial interest in the *transaction*, not in the *conveyance*. That the agent's or attorney's compensation, as well as its amount, was made to depend entirely upon the effectuation by him of the sale only sufficed to render his financial interest therein secondary and incidental.

The *second* question the chancellor resolved in favor of the complainant's view, and, from that premise, logically decreed the extinction of the estate under the *limitation* after the elapsing of the period mentioned in the instrument in these words: "That the rights

[Vizard v. Robinson.]

above conveyed shall continue for a period of eight years from date of this instrument, and no longer." To ascertain the intention is the object of construction of written instruments. That is the true judicial inquiry. In effecting this judicial purpose and duty, rules have become serviceable, have been established, and have been generally accepted.

Among such, these may be here reiterated: (a) Deeds of bargain and sale, for a valuable consideration, are to be construed most strongly against the grantor and in favor of the grantee (2 Devlin, § 848; *Seay v. McCormick*, 68 Ala. 549; *Dickson v. Van Hoose*, 157 Ala. 459, 466, 47 South. 718, 19 L. R. A. [N. S.] 719); (b) the judicial motive, supporting the duty always assumed in construing deeds, is to exert all reasonable efforts to reconcile conflicting parts in a deed, and so in the light of the further rule that in clauses in a deed the *last* must give way to the *first*; and "if, upon a view of the whole instrument, effect can be given to the subsequent clause or meaning to the subsequent words, consistent with the preceding clause, it is then the duty of the court to so construe them."—*Petty v. Boothe*, 19 Ala. 633, 640; *Wallace v. Hodges*, 160 Ala. 276, 281, 49 South. 312; *Ex parte Bearers*, 34 Ala. 73.

Our recent decision in *Zimmerman Manufacturing Co. v. Daffin*, 149 Ala. 380, 42 South. 858, 9 L. R. A. (N. S.) 663, 123 Am. St. Rep. 58, announced upon abundant authority general principles particularly applicable in the solution of the matter under consideration. It was declared that conditions subsequent are not favored in law; that deeds will not be "construed to create an estate on condition, unless language is used which, according to the rules of law, *ex proprio vigore*, imports a condition, or the intent of the grantor to make a conditional estate is otherwise clearly

[Vizard v. Robinson.]

and unequivocally indicated," further observing that "conditions are not to be readily raised by inference or argument," and that in cases of doubt words which might be taken as creating a condition, rather than defining a covenant, will be construed as expressing a covenant only. While the particular deed under review in that instance employed a method of expression quite different from that here employed, the Robinson-Cooper deed, when considered as a whole and construed under the guiding influence of the several rules to which reference has been made, requires a conclusion opposed to that prevailing below.

Unless affected by the term "words before quoted," it is evident that this deed vested an estate in præsenti in Cooper. It conveyed a part of the realty. Unless the term "words" limited it or rendered it conditional, the estate conveyed was absolute, the right to enter the premises and enjoy which might, under well-considered authority in this jurisdiction, be lost, and still the legal title to the timber described abide in the grantee and his successors in title thereto.—*Heflin v. Bingham*, 56 Ala. 566, 28 Am. Rep. 776; *Magnetic Ore Co. v. Marbury Lumber Co.*, 104 Ala. 465, 16 South. 632, 27 L. R. A. 434, 53 Am. St. Rep. 73; *Rothschild v. Bay City Lumber Co.*, 139 Ala. 571, 36 South. 785; *Zimmerman Mfg. Co. v. Daffin*, 149 Ala. 380, 42 South. 858, 9 L. R. A. (N. S.) 663, 123 Am. St. Rep. 58; *Goodson v. Stewart*, 154 Ala. 660, 46 South. 239.

The Robinson-Cooper deed treats, in its granting clause, of two subjects, viz.: First, timber of a certain dimension at the stump on a defined area; second, the means and rights whereby the subject-matter of the major grant might be enjoyed.

The term "words above quoted" are interpolated after the conclusion of the granting clause, though with

[Vizard v. Robinson.]

plain intention they refer to something that has gone before. In describing the *second* subject according to our division, ante, the deed says, after setting forth the calls of the land: "Together with the right to go upon and across said land for the purpose of removing said timber therefrom, *and also the exclusive right to build and construct tramroads or other roads on or across said land for the purpose of removing said timber or any other timber of said Cooper.*" It will be noted that the italicized words create rights beyond anything necessary or convenient to enable the grantee to enter and enjoy the estate previously therein granted to him. These words comprehend an exclusive right to lay tram or other roads on or across the land previously described, and also the right to lay such roads to remove timber, belonging to the grantee, other than that the title to which the conveyance transmitted.

The habendum clause reads: "To have and to hold to the said W. M. Cooper, his heirs and assigns *forever.*" When the italicized word "*forever*" is read in connection with the *first* and *second* subjects of the grant, and the idea their combination expresses is considered in the light of the words, "that the rights above conveyed shall continue for a period of eight years from date of this instrument, and no longer," it is evident that, if the term "words" are taken as limiting the majority grant as well as the defined easements conveyed, a conflicting expression of intention is instituted, and a conditional estate *in the timber*—the land—would be the result, an estate that was forfeited upon the expiration of the period of eight years from the date of the instrument. This status, in construction, may be readily and rationally avoided by the construction, "consistent with the grantors' intent," for it cannot be that the expression of two conflicting intents

[Vizard v. Robinson.]

was their purpose, which refers the term "words" to the "rights" established, though with the limitation by the second subject of the grant. The motive for the distinction thus taken by the grantors lies in the very natural disposition not only to accelerate the removal of the timber so granted but also to terminate, at a definite time, the use of the grantors' land under the other easements the conveyance vested in the grantee. Any other construction would resolve a meaning in doubt to create a conditional estate, and also would establish a status of expression and meaning that comprehended an obvious conflict.

Appropriate objection, seasonably saved, was taken to the quoted matter, ante, from the first paragraph of the agreed statement. It went, in variously stated grounds, to the inadmissibility of that character of parol evidence upon the inquiry involved in the construction of the deed. Under the authority of *Hughes v. Wilkinson*, 35 Ala. 453, 462, et seq., treating fully, avoiding any necessity for repetition here, the rule the objection invokes, it must be held that such evidence was inadmissible. This doctrine of *Hughes v. Wilkinson* has been often recognized here in these, among other, cases: *Guilmartin v. Wood*, 76 Ala. 204, 209; *Sullivan v. L. & N. R. R. Co.*, 138 Ala. 650, 35 South. 694; *Gaston v. Weir*, 84 Ala. 193, 4 South. 258.

The conclusion here not according with that attained below, the decree appealed from is reversed; and a decree will be here rendered declaring the respondent (appellant), the successor in title of W. M. Cooper, the repository, at the time the bill was filed, of the legal title to such timber, of the character described in the conveyance by Robinson and wife to W. M. Cooper, as remains on the lands defined in that deed, but also adjudging that the right to enter the premises to remove

[Nelson, et al. v. Wadsworth, et al.]

such timber and to enjoy the other easements specified in the deed became extinct upon the elapsing of eight years from March 23, 1903, and dismissing the bill.

Reversed and rendered.

DOWDELL, C. J., and SAYRE and SOMERVILLE, JJ.,
concur.

Nelson, et al. v. Wadsworth, et al.

Bill to Declare a Deed a Mortgage and to Redeem.

(Decided April 15, 1913. 61 South. 895.)

1. *Mortgages; Deed as; Evidence.*—The rule that to authorize the court to declare a deed absolute on its face to be a mortgage, it is not sufficient to raise merely a doubt whether the instrument speaks the intention of the parties, but the court must be satisfied by a clear preponderance of the evidence that a mortgage was intended, is without application in cases where the writings express a conditional sale, or where it is admitted that there was a contemporaneous agreement different from that expressed in the instrument.

2. *Same.*—The evidence considered and held sufficient to show that it was the intention of the parties that the instrument should operate as a mortgage.

3. *Same; Transfer of a Grantee; Liability of Grantor.*—The grantee who took land as security for a debt under a deed absolute on its face and conveyed the same to purchasers for value without notice, is bound to compensate the owner upon the deed being declared a mortgage and redemption.

4. *Vendor and Purchaser; Bona Fide Purchase; Deed as Mortgage.*—Bona fide purchasers from one holding under a deed absolute on its face are protected against the grantor in such a deed even though the instrument in reality be a mortgage.

APPEAL from Autauga Chancery Court.

Heard before Hon. W. W. WHITESIDE.

Bill by Mary E. Nelson and others against W. W. Wadsworth and others to declare a deed a mortgage, and to redeem. Decree for respondents, and complainants appeals. Reversed, rendered, and remanded.

[Nelson, et al. v. Wadsworth, et al.]

The substance of the bill will be found set out in the former report of this case in 171 Ala. 603, 55 South. 120. The account referred to in the opinion is as follows:

J. H. Nelson to W. W. Wadsworth, Dr.

1895. To amount from store ledger 204.....	\$ 69 93
Jan. 10. To rent for 1894.....	50 00
Feb. 21. To amount from store ledger.....	10 25
April 9. Rent Nelson Place 1893.....	24 00
April 9. Rent Nelson Place 1894.....	24 00
April 9. Rent of Nelson Place, 1887.....	24 00
Interest eight years, five months, to 4/9/95.....	176 76
Jan. 8. By sundries.....	13 00
Jan. 8. By W. F. Glenn.....	9 00
April 9. Deduction desk.....	2 50
Difference in land deed 1886.....	38 76
Eight years rent at \$24.....	192 00
By cash.....	28 00
To balance.....	95 68

The following is Exhibit C:

“Wadsworth, Autauga Co., Ala., Feb. 25, 1903.

“J. H. Nelson, Lightwood, Ala., to W. W. Wadsworth,
Dr., Manufacturer of and Dealer in Long Leaf Yellow Pine Lumber.

1886. Nov. 13. Land	\$211 24
1887. Nov. 13. 1 yr. Int.....	16 90
	<hr/>
	\$228 14
1888. Nov. 13. 1 yr. Int.....	18 25
	<hr/>
	\$246 39

[Nelson, et al. v. Wadsworth, et al.]

1889.	Nov. 13.	1 yr. Int.....	19 71
			<hr/>
			\$266 10
1890.	Nov. 13.	1 yr. Int.....	21 29
			<hr/>
			\$287 39
1891.	Nov. 13.	1 yr. Int.....	22 98
			<hr/>
			\$310 37
1892.	Nov. 13.	1 yr. Int.....	24 83
			<hr/>
			\$335 20
1893.	Nov. 13.	1 yr. Int.....	26 82
			<hr/>
			\$362 02
1894.	Nov. 13.	1 yr. Int.....	28 96
			<hr/>
			\$390 98
1895.	Nov. 13.	1 yr. Int.....	31 28
			<hr/>
			\$422 26
1896.	Nov. 13.	1 yr. Int.....	33 77
			<hr/>
			\$456 03
1897.	Nov. 13.	1 yr. Int.....	36 48
			<hr/>
			\$492 51
1898.	Nov. 13.	1 yr. Int.....	39 40
			<hr/>
			\$531 91
1899.	Nov. 13.	1 yr. Int.....	42 55
			<hr/>
			\$574 46
1900.	Nov. 13.	1 yr. Int.....	45 96
			<hr/>
			\$620 42

[Nelson, et al. v. Wadsworth, et al.]

1901.	Nov. 13.	1 yr. Int.....	49 63
			<hr/>
			\$670 05
1902.	Nov. 13.	1 yr. Int.....	53 60
			<hr/>
			\$723 65
1903.	Feb. 25.	3 mos. and 12 days Int.....	16 00
			<hr/>
			\$739 65

C. E. O. TIMMERMAN, and W. A. GUNTER, for appellant. On the legal evidence in the case, which was all the evidence the chancellor was privileged to look at, the case was clearly proven in every aspect, and the decree of the chancellor should be reversed and the one here rendered granting relief.—*Nelson, et al. v. Wadsworth, et al.*, 171 Ala. 603; *Napier v. Gulf City Paper Co.*, 177 Ala. 126; *West v. Hendricks*, 28 Ala. 226.

MAC A. SMITH, and RUSHTON, WILLIAMS & CRENSHAW, for appellee. Where several errors are included in one assignment, all must be error or the assignment is not sustained.—*Brent v. Baldwin*, 160 Ala. 635; *Actna L. I. Co. v. Lasseter*, 153 Ala. 630. It is not reversible error for the chancellor to fail to rule on objections to testimony.—*Meyer Bros. v. Mitchell*, 75 Ala. 475; *Nelms v. Kennon*, 88 Ala. 329. The evidence sustains the decree.—*West v. Hendricks*, 28 Ala. 227; *Chapman v. Hughes*, 14 Ala. 218; *Freeman v. Baldwin*, 13 Ala. 246; *Bryan v. Cowart*, 21 Ala. 92; *Bradley v. West*, 27 Ala. 252.

DE GRAFFENRIED, J.—The bill in this cause, as last amended, was filed for the purpose of having that which purports, on its face, to be an absolute deed con-

[Nelson, et al. v. Wadsworth, et al.]

veying a fee-simple title to the lands described therein, declared to be a mortgage, and to cancel said mortgage, or, in the alternative, if the entire indebtedness secured by the said mortgage is found not to have been fully paid, then to redeem.

The bill, as last amended, contains equity.—*Nelson, et al. v. Wadsworth, et al.*, 171 Ala. 603, 55 South. 120.

“To authorize the court to declare a deed absolute on its face to be a mortgage, it is not sufficient to raise merely a doubt whether the instrument speaks the intention of the parties. The court must be satisfied by a clear preponderance of the evidence that a mortgage was intended and clearly understood by the *grantee* as well as the *grantor*.”—*Reeves v. Abercrombie*, 108 Ala. 535, 19 South. 41; *Morton v. Allen*, 180 Ala. 279, 60 South. 866.

The above “severe rule does not apply in cases where the writings express a *conditional sale*, or where it is admitted that there was a contemporaneous agreement different from that expressed in the instrument.”—*Reeves v. Abercrombie, supra*; *Morton v. Allen, supra*.

(2) It appears from the evidence in this case that J. H. Nelson, then something over 50 years of age, owed W. W. Wadsworth, including a debt which Wadsworth paid one Gullege for him, \$211.24, and that on November 13, 1886, the said Nelson, together with his wife, who can neither read nor write, executed and delivered to Wadsworth a conveyance whereby they conveyed to him, in fee simple (so far as the face of the deed shows), 400 acres of land in consideration of \$250 in cash. We think that the evidence discloses that when the conveyance was made the lands were worth considerably more than that sum. Nelson seems to have been at the time he made the conveyance, and probably for several years thereafter, in the employ of Wadsworth

[Nelson, et al. v. Wadsworth, et al.]

as "his business agent." He died in November, 1907, and according to the testimony of his wife, who was 70 years old when she testified, he, "had been very feeble for several years" before he died. It may be that his business relations with Wadsworth while he was able to attend to business, and his feebleness "for several years" prior to his death, account for his failure to enforce the claim which we now have under consideration.

(3) The reporter will set out the account, which is dated "Wadsworth, Autauga county, Ala., Oct. 26, 1897," and which appears on the lower half of page 40 of the transcript. He will also set out that part of Exhibit C which appears on the lower half of page 49 and the upper half of page 50 of the transcript.

It is admitted by Wadsworth, and the accounts taken from his books, which appear in this record, show, that certainly for a number of years after Nelson delivered to him the above deed he still owed Nelson the difference between the \$250 recited in the deed as its consideration and the \$211.24 which Nelson owed Wadsworth when the deed was delivered. The item, "April 9, 1895, Int. 8 yrs. 5 mos., 4/9/95, \$176.76," which appears in the account on the lower half of page 40 of the transcript, read in connection with that part of Exhibit C appearing on the lower half of page 49 and the upper half of page 50 of the transcript, which we have ordered the reporter to set out in his summary of the facts, shows, in our opinion, beyond question, that there must have been, when the deed was delivered, an agreement between the grantor and the grantee that the deed was not to be what, on its face, it purported to be, an unconditional conveyance. Those statements are copied from Wadsworth's books, and while Wadsworth testified in this case we find nothing in his testimony which.

[Nelson, et al. v. Wadsworth, et al.]

consistently with any other theory, explains the presence of those statements on his books. Those statements are strongly corroborative of the testimony of the complainants' witnesses that there was a written agreement giving, as they state it, Nelson 10 years within which to redeem the land. Those statements are contradictory of the testimony of Wadsworth that he made no such agreement, orally or in writing. While this matter is not free from *all* doubt—few human transactions are—we think it clear that there was an agreement when the deed was delivered, understood by both the grantor and the grantee, that the deed was not what it purported to be. The fact that Wadsworth kept this matter on his books and brought it forward from year to year, compounding interest thereon, indicates that there was a *debt*, and, taken in connection with the other testimony in the case upon which we feel that we can rely, stamps the conveyance as, in fact, a mortgage. By so compounding the interest we find from Wadsworth's books that the *debt*, credited with nothing, amounted on February 25, 1903, to \$739.65, and if there was no *debt* that entry on his books should not, and, in our opinion, would not, have been made.

(4) A careful examination of the evidence convinces us, however, that James Esco and E. D. Esco, to whom Wadsworth sold a portion of the above lands, are bona fide purchasers of said lands without notice of complainants' right to or claims upon said lands. As to them the complainants are not entitled to recover. Complainants are, however, upon a statement of the account between them and Wadsworth, entitled to a credit for the amount which Wadsworth received from James Esco and E. D. Esco as purchase money for the said lands.

[Montgomery B. & T. Co. v. Walker.]

It therefore, in so far as Wadsworth, or his estate, as he is now dead, is concerned, appears that the complainants are entitled to redeem.

The said deed, a copy of which appears in the record as Exhibit A to the bill of complaint, is hereby declared to be a mortgage, and this cause is reversed, rendered, and remanded to the lower court for further proceedings in that court in accordance with this opinion.

Reversed, rendered, and remanded. All the Justices concur, except DOWDELL, C. J., not sitting.

Montgomery B. & T. Co. v. Walker.

Bill to Collect and Preserve Assets of Insolvent Bank.

(Decided April 15, 1913. Rehearing denied May 8, 1913.
61 South. 951.)

1. *Constitutional Law; Due Process; Banks and Banking.*—The fourteenth amendment to the Federal Constitution does not deprive the state of the power to determine by what process legal rights may be asserted or legal obligations enforced; hence, the provisions of Acts 1911, p. 59, sec. 10, do not work a deprivation of property without due process of law.

2. *Banks and Banking; Insolvency; Rights of Bank Superintendent.*—Under the provision of sec. 10, Acts 1911, p. 59, the superintendent is, in reality a receiver, and there is no change in the ownership or legal title of the property.

3. *Same; Power of Superintendent.*—Under the provisions of section 10, Acts 1911, p. 59, the superintendent has power to sue in the name of the bank to avoid a fraudulent transaction made by the bank officials.

4. *Same; Trust Fund.*—Regardless of the provision of section 3509, Code 1907, the assets of an insolvent bank must be regarded as a trust fund for the payment of creditors, and the stockholders, directors and agents of the bank are trustees for their benefit, and as such may be made to discover and account in chancery.

5. *Same; Action by Superintendent; Remedy at Law.*—Where the superintendent of banks desires to avoid a transaction whereby the officers of an insolvent institution pledged collateral to another bank for an antecedent debt, as well as one presently created, and challenged the authority of the officers, but offered to do equity, he had

[Montgomery B. & T. Co. v. Walker.]

no plain and adequate remedy at law, and the jurisdiction of equity was properly invoked.

6. *Same*.—Where the superintendent of banks filed a bill to set aside a pledge of the assets of an insolvent bank made by its president, and averred that the president had no such authority, it was not necessary that the bill should negative special authority, as that was a matter of affirmative defense.

7. *Same; Power of President*.—The rule that presidents of corporations have no ex-officio power to sell or mortgage the property of the corporation, applies to bank presidents, and such officials have no right to pledge the assets of the bank, particularly to secure an antecedent and questionable debt.

8. *Same; Power of Cashier*.—While the cashier of a bank is its chief executive officer, and his authority exceeds that of the president and while he may sell the banks negotiable security in the regular course of business, his power is not unlimited, and he cannot pledge the assets of the bank for the payment of an antecedent debt.

APPEAL from Geneva Chancery Court.

Heard before Hon. L. D. GARDNER.

Bill by A. E. Walker, as Superintendent of Banks, against the Montgomery Bank & Trust Company to collect and preserve the assets of the Bank of Geneva, of which he had taken charge by virtue of his office. From a decree overruling demurrers to the bill, respondent appeals. Affirmed.

The bill alleges, among other things, that the Bank of Geneva was, prior to June, 1912, engaged in the banking business at Geneva, Ala., and was organized and incorporated under the laws of this state; that it did a general banking business, and had a capital stock of \$50,000; that J. R. Clark was elected president of said bank, and he assumed the duties thereof and acted as such continually until June 3, 1912; and that a board of directors, consisting of five persons, whose names are set out, were elected to and did serve as directors of said bank.

In the fourth paragraph it is alleged that within two or three years after its organization the bank became insolvent, and that such condition remained and grew

[Montgomery B. & T. Co. v. Walker.]

worse, and further alleges that the bank is now insolvent.

In the fifth paragraph it is alleged that during the active existence of the bank it became connected in a business way with the Montgomery Bank & Trust Company, the respondent below, and that at times the Montgomery Bank & Trust Company made loans to the Bank of Geneva and extended it credit. In the same paragraph it is alleged that J. Lee Holloway was a stockholder and director in both banks, and was related to J. R. Clark, president of the Bank of Geneva; that said Holloway and other officers and directors of the Montgomery Bank & Trust Company had opportunity to know, and did know, the financial condition of the Bank of Geneva at the times set out later in the bill; that Clark had confidence in the Montgomery Bank & Trust Company and in T. E. Lovejoy, its president; and that the relations between the two banks were cordial and friendly until a short time prior to June 3, 1912.

In the sixth paragraph it is alleged that the Montgomery Bank & Trust Company claimed that the Bank of Geneva was indebted to it in the sum of \$25,753.24, maturing and coming due some four or five years prior to this date; that in fact the greater portion of the amount arose prior to the organization of the Bank of Geneva, being due and owing by the First National Bank of Geneva, and alleges that he does not know the nature of the claim, but he does allege that it was not in the form of a bill receivable; and that the Montgomery Bank & Trust Company held no written obligation of the Bank of Geneva to pay the same until the spring of the year 1912, and shortly prior to June 3, 1912. He alleges also in the paragraph that the Bank of Geneva did not owe the alleged claim or demand, and was in no wise connected with it, and that the Bank of Geneva

[Montgomery B. & T. Co. v. Walker.]

never entered the same upon its books as a liability or bills payable, and that the Bank of Geneva denied and disputed said alleged claim or demand, which fact was known to the Montgomery Bank & Trust Company prior to June 3, 1912.

In the seventh paragraph he alleges that T. E. Lovejoy, president of the Montgomery Bank & Trust Company, knew that the Bank of Geneva was hopelessly insolvent, and with that knowledge on his part, and through him on the part of the Montgomery Bank & Trust Company, and with the purpose and intent and the ultimate design of securing the alleged indebtedness of \$25,753.24, caused many wrongs to be committed against the Bank of Geneva and its creditors, and obtained physical possession, in the way of collateral security, of much of its assets to which it was not and is not entitled; that during the winter or spring of 1912, the Bank of Geneva being in desperate straits and being almost forced to cease business on account of insufficient funds, a fact which the bill alleges was known by the Montgomery Bank & Trust Company, for speedy and immediate relief in the way of borrowing from it a certain sum of money, the Montgomery Bank & Trust Company, being afraid to loan the Bank of Geneva money, required the Bank of Geneva to put up collateral to secure a loan of from \$5,000 to \$7,000. And in the same paragraph the bill alleges that the Montgomery Bank & Trust Company, in acquiring and taking over the collateral for said loan and to secure the same, and with the purpose and intent on their part to secure its alleged claim against the Bank of Geneva, and for the purpose of securing a preference for said alleged indebtedness, and in fraud of the rights of the creditors of the Bank of Geneva, required Clark, president of the Bank of Geneva, to assign, pledge, and turn over to said

[Montgomery B. & T. Co. v. Walker.]

Montgomery Bank & Trust Company a large amount of securities owned and held by the Bank of Geneva, to wit, \$60,000, and of the value of \$32,000; in accordance with such requirement the said Clark turned over and delivered to Montgomery Bank & Trust Company said collateral.

In the eighth paragraph the bill alleges that the Bank of Geneva was cited to appear before the State Banking Board at Montgomery on, to wit, June 3, 1912, to show cause why said Bank of Geneva should not cease as a going concern and its business and affairs be wound up and liquidated by said board; that on that day no cause being shown, and, in fact, consent being given, the affairs and business of said Bank of Geneva were taken over by said Banking Board and process of liquidation commenced by A. E. Walker, as Superintendent of Banks; that the property, assets, and affairs of the Bank of Geneva are held by A. E. Walker, as Superintendent of Banks, for the purpose of liquidation and the collection of its debts and payment of its liabilities; and he alleges that the assets are not sufficient to pay the liabilities, setting out the amounts; and in the same paragraph charges that Lovejoy, and probably others connected with the Montgomery Bank & Trust Company, knew that the Bank of Geneva had been cited to appear before the said Banking Board and knew, or honestly believed, that said Bank of Geneva would cease business and its affairs would be wound up through the Banking Board; that in anticipation of such course, and in furtherance of the design, intent, and scheme of the Montgomery Bank & Trust Company to collect the alleged debt and to appropriate for that purpose a substantial portion of the assets of the Bank of Geneva, and in fraud of the rights of the creditors, the Montgomery Bank & Trust Company on, to wit, June 2, 1912,

[Montgomery B. & T. Co. v. Walker.]

sold, or pretended to sell, collateral held by it, or substantially all of it, and claims to have purchased it at and for the sum of \$1,500, leaving thereby a large balance due on said alleged debt. And it is further averred and charged that the Banking Board, or the Superintendent of Banks, had no knowledge of the alleged sale until two or three weeks thereafter, and that, if notice was given, it was done by insertion in some newspaper of small circulation; and it further alleges that the Montgomery Bank & Trust Company is now holding the collateral and asserting rights to all of it and refuses to surrender it to the Superintendent of Banks.

In the tenth paragraph the bill charges that the pledge of said collateral to the Montgomery Bank & Trust Company was and is absolutely void for that J. R. Clark, as president of the Bank of Geneva, had no authority, as president or otherwise, to pledge or dispose of the assets of the Bank of Geneva in that manner.

In the eleventh paragraph he says that, if he is mistaken in that, then he charges that the contract or agreement whereby the Montgomery Bank & Trust Company acquired said collateral was and is wholly void for that the Bank of Geneva had no authority or right to pledge said property without authority of its board of directors, and no such authority was given as required by law.

In the twelfth paragraph he says that, if he is further mistaken, he then charges that the pledge of said collateral was and is wholly void for that the same was acquired by the Montgomery Bank & Trust Company with the intent to have itself preferred and with intent to hinder, delay, and defraud creditors of the Bank of Geneva from their lawful and just demands and claims.

[Montgomery B. & T. Co. v. Walker.]

In the thirteenth paragraph he says that, if he is mistaken in all that he has heretofore alleged, then he alleges that the transfer and pledge of said collateral to the extent of the excess of the amount claimed by Montgomery Bank & Trust Company over and above the \$7,000 borrowed and admitted is void as to any other and further amount for that said Bank of Geneva did not owe the Montgomery Bank & Trust Company said amount of \$25,753.24, or any portion thereof, as claimed and alleged by the Montgomery Bank & Trust Company, and that therefore the pledge of collateral to secure said fictitious claim was and is void. And also in the same paragraph the bill says that, if mistaken as to the existence of the debt, then he says that Clark had no authority, and the Bank of Geneva had no authority, to pledge its property and assets to secure a past-due debt and give such creditor preference over other creditors; the said Bank of Geneva at the time being insolvent, and this fact being known to the Montgomery Bank & Trust Company.

In the fourteenth paragraph of the bill he alleges that, if mistaken in all the other allegations and charges, he says that if the Montgomery Bank & Trust Company is rightfully and legally entitled to hold said collateral, or any portion of same, for and on account of any valid debt due the Montgomery Bank & Trust Company by the Bank of Geneva, the complainant is willing and offers to redeem such collateral by paying such amount as may be required by this court, and for that purpose submits itself to the jurisdiction of the court.

To this bill the respondent filed demurrers raising the following questions: 1. That there was no equity in the bill for the reason that A. E. Walker, as Superintendent of Banks, had no authority under the laws of

[Montgomery B. & T. Co. v. Walker.]

the state of Alabama to file or maintain the bill in this case; that he did not have title to the property; that he was not authorized to bring the suit; that the provision in the banking act authorizing him to take possession of the property of banks was in violation of the Constitution of the state of Alabama and of the United States; that the complainant had a clear and adequate remedy at law; that the president of the institution being a banking institution, had a right to pledge the property of the bank as collateral for its debts with power to bind the bank; that the allegations with reference to the preference of creditors was entirely inadequate; that the bill showed, that at the time of the sale of the collateral and the purchase by the Montgomery Bank & Trust Company, there was an amount due by the Bank of Geneva to the Montgomery Bank & Trust Company which was unpaid; that pledged collateral after sale cannot be redeemed, and other points.

BALL & SAMFORD, for appellant. It takes the judgment of a court of competent jurisdiction to be due process of law.—8 Cyc. 1080-1085. Hence, if the act gave the Superintendent of Banks title to the property in such sort as would authorize him to maintain this suit, it is violative both of the Constitution of the United States, and of the state of Alabama, as denying due process of law. The Superintendent of Banks has no authority under law to file or maintain the bill in this case.—16 Cyc. 159-B, 190 (2); 15 Enc. P. & P. 590-4; *Parkman v. Aircardi*, 34 Ala. 399; 30 Cyc. 94. At most the superintendent of banks is a mere agent under the statute and agents are not proper parties to a suit in chancery.—16 Cyc. 197; 15 Enc. P. & P. 598. The corporation, and not its officers must sue to redress wrongs of the corporation.—22 N. J. E. 63; 28 W. Va. 750. A

[Montgomery B. & T. Co. v. Walker.]

real party in interest is not the superintendent of banks in this instance.—30 Cyc. 44, 83. Even if authorized to maintain this suit, he had a plain and adequate remedy at law. The president of a bank is such a general executive officer as may within the scope of his apparent authority bind the bank by a transfer of its assets to secure its obligations.—5 Cyc. 469; *First Nat. Bank v. First Nat. Bank*, 116 Ala. 521; *Wynn v. Tallapoosa Bank*, 168 Ala. 469. It is within the apparent authority of a cashier of a bank to borrow money and pledge collaterals.—11 L. R. A. (N. S.) 598; 24 L. R. A. 264; 19 L. Ed. 1008; 5 Cyc. 457; *Ala. Nat. Bank v. O'Neal*, 128 Ala. 196. The fact that one of the directors of the Bank of Geneva was also a director of the Montgomery Bank & Trust Company was not notice to the latter of any limitations or other facts known to the former.—*Scott v. Choctaw Bank*, 59 South. 184. It is a matter of common knowledge that the affairs of the bank are left largely to the management of the president and cashier, and hence, their transactions will be held good.—24 L. R. A. 264. The bank had a general lien on all collaterals in its possession to secure its indebtedness.—*Wynn v. Tallapoosa Bank*, *supra*; 31 Cyc. 831.

W. O. MULKEY, for appellee. The banking law in some of its features is modeled largely after the National Banking laws, and in this case, section 10, of the Acts of 1911, p. 59, is similar to section 5234, of the National Banking Act, and gave the superintendent authority as a receiver with power to maintain such suits as these, or other suits to collect and reduce the assets of the insolvent state bank.—8 Ben. 357; 14 Wall. 383; 17 Wall. 19; 34 Cyc. 186; *Banks v. Spears*, 103 Ala. 436; *Calhoun v. Fletcher*, 63 Ala. 574; *Oates v. Smith*, 57 South. 440; *Howarth v. Lombard*, 175 Mass. 570.

[Montgomery B. & T. Co. v. Walker.]

The remedy at law was inadequate, and the bill was properly filed in the chancery court.—Sec. 3509, Code 1907; 16 Cyc. 1264. The property of the corporation cannot be pledged, mortgaged or disposed of without affirmative action on the part of the board of directors, and neither the president nor the cashier of the bank can do so without authority from the board.—Subd. 3, sec. 3481, Code 1907; *Buchald T. Co. v. Hurst*, 19 A. & E. Ann. cases, 619; 115 Ala. 322; 50 Am. Dec. 394; 23 Id. 728; 56 Id. 116; 25 Am. Rep. 506; 78 Am. St. Rep. 560; 79 Mo. App. 352. There is no doubt about the constitutionality of the act, and it is not to be criticized as withholding due process of law.—145 Ala. 662; 151 Ala. 469; 152 U. S. 377; 181 U. S. 183; 139 U. S. 462; 182 U. S. 427; 48 L. R. A. 679; 28 L. R. A. 769; 8 Cyc. 1095.

ANDERSON, J.—“While forms of procedure and practice may be altered, due process requires that the substance of property rights be preserved, and that an opportunity remain to invoke the equal protection of the law by some judicial proceeding adequate and appropriate. The fourteenth amendment does not undertake to control the power of a state to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided.”—8 Cyc. 1095. The essential elements of due process of law are notice and opportunity to defend, and, in determining whether such rights are denied, the courts are governed by the substance of things and not by mere form.—*Simon v. Craft*, 182 U. S. 427, 21 Sup. Ct. 836, 45 L. Ed. 1165; *L. & N. R. Co. v. Schmidt*, 177 U. S. 230, 20 Sup. Ct. 620, 44 L. Ed. 747. Section

[Montgomery B. & T. Co. v. Walker.]

10 of the Act of 1911, p. 50, which said act created the banking department of the state, requires that, before the banking board shall declare a bank in default or turn its affairs over to the Superintendent of Banks, the superintendent must first submit to the board the matters of default or misconduct in the affairs of the bank, of which the bank shall have notice and upon which it may be heard in person or by counsel. This section also authorizes the bank, if it feels aggrieved by the action of the board to apply, within ten days, to the chancery or circuit court for an injunction, and authorizes a reinstatement in case the application is meritorious. We think that the act meets the due process requirement of the federal Constitution.

Moreover, we do not understand the act as making this proceeding operate as a change in the ownership or legal title to the property, but the superintendent is in reality a receiver who takes charge of the bank for the benefit of the stockholders, depositors, and other creditors.

We also think that the superintendent has the authority, under the terms of the act, to maintain this bill or to bring suit for the recovery of the assets of the bank. The act not only authorizes the superintendent to collect all debts due and claims belonging to the bank, but "to do such acts as are necessary to conserve its assets and business." The state banking law, and under which this bill is filed, in some of its features is modeled largely after the National Banking Laws. Section 5234 of said National Bank Act (U. S. Comp. St. 1901, p. 3507) reads as follows: "Appointment of Receivers. On becoming satisfied, as specified in sections fifty-two hundred and twenty-six and fifty-two hundred and twenty-seven, that any association has refused to pay its circulating notes as therein mentioned, and is

[Montgomery B. & T. Co. v. Walker.]

in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such receiver, under the direction of the Comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court * * * sell all real and personal property," etc. We find no other authority in the act looking to the end of collecting the assets of the insolvent banks. The question as to the authority of the receiver to maintain suits and prosecute causes arising with respect to winding up the affairs of the bank has been repeatedly settled by the decisions of the Supreme Court of the United States. "It being a part of the affirmed duty of the receiver to collect the assets of the bank, he may, as statutory assignee, sue therefor in his own name as in the name of the bank."—*National Bank v. Kennedy*, 17 Wall. (U. S.) 19, 21 L. Ed. 554; *Bethel Bank v. Pahquioque Bank*, 14 Wall. (U. S.) 383, 20 L. Ed. 840; *Stanton v. Wilkeson*, 8 Ben. (U. S.) 357, Fed. Cas. No. 13,299.

Section 3509 of the Code of 1907 says: "The assets of any insolvent corporations constitute a trust fund for the payment of the creditors of such corporations, which may be marshaled and administered in courts of equity in this state" Independent, however, of this statute, and whether it does or does not cover this identical cause, this court, in speaking of insolvent banks, in the case of *Bank of St. Mary's v. St. John et al.*, 25 Ala. 612, through LIGON, J., said: "The capital stock of the bank, with all of its property and assets, is to be regarded as a trust fund for the payment of creditors; and the stockholders, directors, and agents of the bank are trustees for their benefit, and as such may be made to discover and account in chancery. So, also, if any

[Montgomery B. & T. Co. v. Walker.]

one interfere with the trust fund without authority, and squander or misappropriate it, he will be held to be a trustee and made to account as such.—7 Beav. 175.”—*City Bank & Trust Co. v. Leonard*, 168 Ala. 404, 53 South. 71.

The bill charges that Clark, the president, after the Bank of Geneva became insolvent, and which fact was known to the respondent, fraudulently and collusively with said respondent surrendered a large amount of collaterals of said insolvent bank, not only to secure the debt of \$7,000 presently contracted, but in order that said respondent could use and handle said collaterals for the additional purpose of paying itself in full or partially a debt owing by the First National Bank of Geneva, and which was not owing by the present Bank of Geneva. The bill questions the authority of the president, Clark, to assign the collaterals at all, but offers to do equity, in case the respondent has a right to the collaterals to the extent of securing the loan actually made, and to pay said indebtedness upon the surrender of the collaterals, and it is difficult to conceive of adequate and complete relief by an action at law.

The president of a corporation, by virtue of his office, has no implied power to sell or mortgage property of the corporation.—*Drennen v. Jasper Investment Co.*, 153 Ala. 322, 45 South. 157. See also, note to *Buchwald Transfer Co. v. Hurst*, 19 Ann. Cas. 623. This rule applies to presidents of banks as well as presidents of other corporations, and who have no authority other than what is expressly granted by the charter, by-laws, etc.—*Gibson v. Goldthwaite*, 7 Ala. 283, 42 Am. Dec. 592; *Spyker v. Spencer*, 8 Ala. 333. “He has no more power of management or disposal over the property of the corporation than any other single member of the

[Montgomery B. & T. Co. v. Walker.]

board. These remarks, of course, refer to his inherent powers enjoyed *virtute officii*, for, of course, if any resolution or any established usage gives him the power, either at all times or under special circumstances, to draw against the corporate deposits, he may do so within the limits of the power. * * * When the general management of the affairs of the bank is left, as is customary, with the directors, the president has not power to mortgage, assign, or pledge any more than he has to dispose otherwise of any of its property of any description whatsoever, or for any purpose, however justifiable and proper in itself."—Morse on Banking, §§ 143, 144. It has been held, however, in many cases that, where the president has no inherent power, he binds the bank in many instances by usage or express authority. "The cases, though largely occupied in deciding that a president has no authority by virtue of his office, yet hold the bank bound by his action whenever the charter, or a vote of the directors, or usage of the bank, or long acquiescence by the bank in a course of action by the president, or any facts constituting a holding out of the president by the bank as having a right to act for it, lay a foundation for authority actual or inferred, and whenever the bank has ratified his action." The present bill expressly charges that the president of the Geneva bank had no authority to pledge the collaterals to the respondents, and this feature of the bill is challenged by demurrer upon the idea that the office of president necessarily carries with it the authority to do what Clark did, and that the bill should charge wherein Clark's authority was properly curbed or restricted. As heretofore observed, the office did not carry with it the inherent power to pledge the collateral in the manner charged in the bill, and if special authority was given Clark, or his action was ratified or acquiesced in

[Montgomery B. & T. Co. v. Walker.]

so as to make the bank legally responsible for same, this would be defensive matter which the bill did not have to anticipate by a negative averment.

The cases of *First National Bank of Birmingham v. First National Bank of Newport*, 116 Ala. 521, 22 South. 976, and *Wynn v. Tallapoosa Bank*, 168 Ala. 469, 53 South. 228, each deal with the acts of the cashier and not the president of the bank, and the books recognize a decided distinction between the inherent authority of these two officers. Moreover, the authority was upheld in each of said cases upon the idea that the dealing was with innocent people and by cashiers acting within the general scope of duty and in whose acts there were years of acquiescence and ratification. The bill here charges that the respondent was not only an innocent purchaser, but that the \$25,000 claimed of the old Geneva bank was not owing by the present one, and that the second loan was made collusively with Clark and for the purpose of surrendering collaterals greatly in excess of said last loan, for the fraudulent purpose of using said collaterals to liquidate the old debt of the First National Bank of Geneva, and for which the present Bank of Geneva was not liable.

The case of *Citizens' Bank v. Waddy*, 126 Ky. 169, 103 S. W. 249, 11 L. R. A. (N. S.) 598 128 Am. St. Rep. 282, involved the authority of a cashier, and not a president, to borrow money and pledge the securities of the bank. Moreover, there was no governing board, and the cashier seems to have been in entire control for the stockholders who had no board of directors.

The cashier is the chief executive officer of the bank through whom the financial operations of the bank are conducted, and, while his authority is not unlimited, it exceeds that of the president.—Morse on Banking, § 152. The cashier has no inherent power, however, to

[Allen, et al. v. State, ex rel. Rowe, et al.]

pledge the assets of the bank for the payment of an antecedent debt. He may dispose of the bank's negotiable securities in the regular course of business, but he cannot pledge its assets for the payment of an antecedent debt.—Morse on Banking, § 169.

The chancery court did not err in overruling the respondent's demurrers to the bill of complaint, and the decree is accordingly affirmed.

Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

Allen, et al. v. State, ex rel. Rowe, et al.

Bill for Seizure, and the Sale of Intoxicating Liquors.

(Decided April 17, 1913. 61 South. 912.)

1. *Intoxicating Liquors; Regulation; Drunkenness.*—The Fuller and Carmichael Bills, Acts 1909, p. 8 and p. 63, are in force in those counties in which the manufacture and sale of liquor has not been made lawful under the provisions of the Smith and Parks Bills, Acts 1911, p. 30, and 250, but the Excise Commission of a town without a policeman or marshal was without right to issue a retail liquor license, and the courts not having the power to require the employment of police officers, the sale of liquor in such town was unauthorized, notwithstanding the Excise Commission of the town authorized the issuance of the liquor license and such license was issued; hence, the injunctive process authorized by the Fuller and Carmichael Acts was appropriate to abate sales under such license.

2. *Same; Power to Issue License; Collateral Attack.*—The wholly void act of the Excise Commission of a town in authorizing the issuance of a retail liquor license may be collaterally attacked or wholly ignored.

3. *Officers; Tenure; Authority; How Raised.*—The title to town offices must be tested by a direct proceeding, and cannot be raised or determined in a collateral proceeding for writ of injunction, and a seizure against the sale of intoxicating liquors by one to whom excise officers had issued a void liquor license.

APPEAL from Mobile Law and Equity Court.

Heard before Hon. SAFFOLD BERNHEY.

[Allen, et al. v. State, ex rel. Rowe, et al.]

Bill by the State, on the relation of W. R. Rowe and others, against Frank L. Allen and others for writ of injunction and a seizure against the sale of intoxicating liquors in the town of Citronelle. From a decree for relators, respondents appeal. Affirmed.

The facts of the allegations are that Frank Allen and the others named as co-respondents, who are in the employment of said Frank Allen, are engaged in the sale of spirituous, vinous, or malt liquors in a certain building within the corporate limits of the town of Citronelle, Ala., and that in said building they have stored and keep for sale such liquors and sell them. But Allen has a retail liquor license, and has paid the requisite tax for the same, but that Citronelle is not a town in which it is lawful to sell, give away, or otherwise dispose of such liquors, in that it has not a policeman or marshal continually employed, but that, in fact, has no marshal or policeman at all, and has no police protection of any sort.

WEBB & MCALPINE, for appellant. The writ ought not to be awarded in this case because the license has already been granted to Allen.—*Excise Commission of Citronelle v. State ex rel. Skinner*, 179 Ala., Acts 1911, p. 8; Acts 1911, p. 250. The duty of protecting the city was mandatory upon the council to give the city police protection.—38 Ga. 542; Sec. 1251, Code 1907; McQuillan Mun. Ord., Sec. 183.

R. P. ROACH, for appellee. The Carmichael and the Fuller Bills apply and control in a town without police protection under the very terms of the Smith and Parks Bills.—*Alford v. State*, 170 Ala. 178; *Wes. R. v. Capitol B. Co.*, 59 South. 54; *State ex rel. Crumpton v. Montgomery*, 59 South. 299. It is entirely discretionary with

[Allen, et al. v. State, ex rel. Rowe, et al.]

the town whether it will employ marshal and policemen or not.—Sec. 1171, Code 1907; McQuillan's Mun. Ord. 231; 100 Ky. 166. The legality of the title to the office of mayor and councilmen of Citronelle cannot be raised and tried in this proceeding.—*Butler v. Walker*, 98 Ala. 358. The granting of the license was void under the law.—*Murphy v. Bishop*, 78 Ala. 405; *Wiley v. State*, 117 Ala. 158. This being true it is open to collateral attack or may be wholly ignored.—*Howell v. Hughes*, 168 Ala. 467; *Wilson v. Holt*, 83 Ala. 526; *Brock v. Frank*, 51 Ala. 85.

MCCLELLAN, J.—The bill exhibited by the state on the relation of W. H. Rowe et al. would invoke the injunctive power authorized by the Fuller and Carmichael Bills (Acts Sp. Sess. 1909, pp. 8 and 63, respectively) to abate liquor nuisances.—*Fulton v. State*, 171 Ala. 572, 586, 54 South. 688 et seq. By section 10½ of the Parks Bill (Gen. Acts 1911, p. 30) it is provided: "The sale of spirituous, vinous, malt and other intoxicating drinks and beverages enumerated in this bill, shall not be permitted outside the corporate limits of cities or towns, nor shall the sale of such drinks and beverages be permitted in any town which has not at least one policeman or marshal continually employed." By section 2 of the Smith Bill (Gen. Acts 1911, p. 250) it is provided: "That there be and is hereby created an excise commission for each city or town wherein the manufacture and sale of spirituous, vinous or malt liquors under license is authorized," etc. By section 9 of the Smith Bill (Gen. Acts 1911, p. 255) it is provided: "That no license to manufacture or sell spirituous, vinous or malt liquors outside of the corporate limits of a city or town with at least one marshal or policeman shall be granted."

[Allen, et al. v. State, ex rel. Rowe, et al.]

Under these provisions, which are of effect in Mobile county, it is plain that no license to sell or manufacture spirituous, vinous, or malt liquors can lawfully issue where the municipality in which it purports to warrant the traffic has not police protection described therein. An attempt to issue a license in any town or city without such police protection is a violation of the express prohibition of the laws quoted, and, if one holding such vain, only apparent, authorization, sells or manufactures such liquors, he cannot, of course, find protection from the consequences that attend an illegal, unauthorized traffic in such liquors. Whether a municipality shall preserve the peace and safety of its people through a police officer or officers is committed to the discretion of its governing authority.—Pol. Code, §§ 1171, 1251. We know of no positive law requiring the selection or retention of a police officer or officers in the town of Citronelle. None, to that effect, has been called to our attention. Hence there is no power in the courts to exact the employment of that means for the preservation of the peace and the safety of the people in municipalities in this state.

Except as repealed by repugnant provisions of the Smith and Parks Bills, the Fuller and Carmichael Bills are in force in those counties in which the manufacture and sale of spirituous, vinous, and malt liquors has become lawful after a vote by the people to that end under the Parks Bill.—*Western Railway Co. v. Capital Brewing Co.*, 177 Ala. 149, 59 South. 52-54; *State ex rel., etc., v. Montgomery et al.*, 177 Ala. 212, 59 South. 299. In the former decision it is said: "The recital of the acts shows, first, what 'prohibited liquors' means; second, that the sale of them is still unlawful under the general laws of Alabama, and the later acts are based upon the fact that this is the general law and policy of the

[Allen, et al. v. State, ex rel. Rowe, et al.]

state of Alabama, and provide merely that the sale, etc., of the same may be legalized in the towns and cities of the state, by a vote of the people. As to all other places, and as to all other parts of said acts not authorized to be changed by the vote of the people, the law necessarily remains just as it was before." The injunctive process authorized by the laws mentioned is now appropriate to abate liquor nuisances in counties that have not authorized (by ballot) the traffic therein.

It is urged that the ruling in *Excise Commission of Citronelle v. State ex rel. Skinner*, 179 Ala. 654, 60 South. 812, established the judicial nature of excise commissioners in respect of the issuance of licenses to liquor dealers. The question there considered and soundly decided involved the features of the license laws that have to do with petitions or recommendations supporting an applicant's application for license. The matter of power of an excise commission to issue a license for the traffic in a territory in which upon condition the license could not validly issue was not there considered or decided.

The bill and supporting affidavits in this instance make a case of entire want of power in the excise commission of Citronelle to issue Allen (appellant) a license to engage in the traffic therein, for that there has been since December 1, 1912, no police protection in that municipality of the character the laws prescribed as a condition to the right to issue liquor licenses in that municipality. Being, on the facts averred and supported by the affidavits filed, without any power to issue this license to Allen in Citronelle, the act of the excise commission was wholly void; and its act in attempting to authorize Allen to engage in the traffic may be collaterally impeached or wholly ignored.—*Beasley v.*

[Enterprise Lumber Co., et al. v. First Nat. Bank.]

Howell, 117 Ala. 499, 22 South. 989; *Carr v. Illinois Central R. R. Co.*, 180 Ala. 159, 60 South. 277.

The right of tenure of office of certain members of the governing body of Citronelle cannot be raised or determined in the purely collateral way here sought to be asserted. The title to office must be tested in a direct proceeding.—2 McQuillam, § 469; *Ex parte Harris*, 52 Ala. 87, 23 Am. Rep. 559; *Beebe v. Robinson*, 52 Ala. 66; *Goodwyn v. Sherer*, 145 Ala. 501, 40 South. 279; *Little v. City of Bessemer*, 138 Ala. 127, 35 South. 64.

These considerations lead us to the conclusion that no error is shown in respect of the issuance of the preliminary injunction.

Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

Enterprise Lumber Co., et al. v. First Nat. Bank.

Bill for Interpleader.

(Decided February 13, 1913. Rehearing denied April 23, 1913.
61 South. 930.)

1. *Interpleader; Grounds.*—To maintain a bill of interpleader it must be alleged and shown that the subject matter was claimed by all the rival claimants, that all the claims are through a common source; that complainant has no interest in the subject matter, and has incurred no independent liability to any of the claimants.

2. *Same; Liability of Debtor; Bank Deposit.*—Where a fund was subscribed by various individuals and deposited in the bank to be paid to a corporation upon its completion of a railroad in accordance with a contract, and a dispute arose between the company and some of the subscribers as to whether the railroad conformed to the requirements of the contract, the fact that the bank has kept the fund as a general deposit subject to check, and has thereby become indebted to those entitled thereto, does not show that the bank has incurred such a liability to any of the claimants as will preclude its right to interplead.

[Enterprise Lumber Co., et al. v. First Nat. Bank.]

3. *Same*.—Where a bank asked for interpleader to compel a corporation and several subscribers to a fund to interplead to determine their rights to the fund, the fact that the bank has permitted some of the subscribers to deposit their subscriptions in another bank does not preclude its right to an interpleader, where it acknowledges its liability for the whole amount subscribed.

4. *Same; Adverse Claim; Identity*.—The fact that the corporation claims the entire fund, and the subscribers each claim only a part thereof, does not destroy the right of the bank to have the claimants interplead.

5. *Same; Separate Claims*.—Where the bank filed a bill and asked that the corporation and several individual subscribers to a bonus for the construction of a railroad, which fund was deposited in the bank, be required to interplead as to their claims to the fund, and pays the fund into court, the fact that some of the subscribers to the fund thereafter withdrew their claims does not affect the rights of the bank to have the others interplead.

6. *Equity; Multitude of Suits*.—Equity abhors a multitude of suits, and will settle all matters in dispute in one suit, when it can be done under its rules reasonably construed.

APPEAL from Houston Chancery Court.

Heard before Hon. L. D. GARDNER.

Bill for interpleader by the First National Bank of Dothan against the Enterprise Lumber Company and others. From a decree granting the relief prayed for, the respondent Enterprise Lumber Company appeals. Affirmed.

The following are the exhibits to the bill of complaint:

Exhibit A.

"State of Alabama, Houston County. Know all men by these presents that whereas, the town of Dothan has agreed to raise the sum of \$25,000 in cash to be deposited as follows: One-half in the Dothan National Bank and one-half in the First National Bank of Dothan, to the credit of the Enterprise Lumber Company, a corporation having its principal place of business in the city of Atlanta, state of Georgia, and for said sum of money so deposited, as an absolute donation to the

[Enterprise Lumber Co., et al. v. First Nat. Bank.]

Enterprise Lumber Company, the said Enterprise Lumber Company does hereby promise and agree to build a chartered railroad from the town of Dothan, Houston county, Ala., to some deep-water harbor on the Gulf of Mexico, and to operate the same as a common carrier, for the transportation of passengers and freight of every kind and description usually carried by railway companies: It is contemplated by this contract that the said Enterprise Lumber Company shall finish said railroad from Dothan to said deep-water harbor within three years after the signing and delivery of this contract; but, in case the said Enterprise Lumber Company shall exercise reasonable diligence in the prosecution of its work in building said railroad, and it shall require a longer time than three years to finish said road, the said Enterprise Lumber Company shall not have more than four years to finish same from the signing and delivery of this contract. In any event, the said railroad shall be finished to the Pensacola & Atlantic Division of the Louisville & Nashville Railroad within 15 months from the signing and delivery of this contract. When said railroad is finished from Dothan to the Pensacola & Atlantic Division of the Louisville & Nashville Railroad, the said Dothan National Bank will, and it hereby agrees to, pay the check of the Enterprise Lumber Company for \$4,166.66, a debit to be charged against the said deposit of \$12,500, and at the same time the said First National Bank of Dothan will, and it hereby agrees to, pay the check of the said Enterprise Lumber Company in the sum of \$4,166.66, to be charged against the said deposit of \$12,500, and the balance of said money in said banks shall be paid to the said Enterprise Lumber Company upon its check when said railroad has been finished. And within the meaning of this contract, the said railroad is to be

[Enterprise Lumber Co., et al. v. First Nat. Bank.]

finished when a passenger train is run over said road from Dothan to said deep-water harbor on the Gulf of Mexico. It is further agreed that in addition to the said \$25,000 to be paid to the said Enterprise Lumber Company, the town of Dothan shall deliver to the said Enterprise Lumber Company a certified copy of an ordinance, wherein the said town shall agree to furnish for a term of five years a reasonable amount of electric lights for the purpose of lighting its yards, depot, office, and shops, and a reasonable supply of water for its office, shops, depot, and engines: Provided that such supply of water shall not interfere with or cut off the supply of water to the citizenship of Dothan. It is agreed, also, that the said town, under proper ordinance or resolution, shall permit the said Enterprise Lumber Company, in the construction and operation of its railroad, to cross its streets, and use Range street for its line of railroad, or spur track, for its main line to the Atlantic Coast Line Railroad. It is further agreed that the town of Dothan will exempt the said railroad company from all license and taxes for the term of five years. The said banks do not assume liability on this contract, except in so far as the same relates to the deposit of said money in its said bank separately, and are not held responsible for that part of this contract which refers to lights, water, license, taxes, and streets. This contract is made with the various subscribers of the said sum of \$25,000; and, in case the said Enterprise Lumber Company, its agents or assignees, shall fail to perform its contract, the said banks shall refund the said amounts subscribed by them without interest. This contract is signed and sealed, on this, the 2d day of June, 1905, in triplicate—one copy for the Enterprise Lumber Company and for each of the banks—and becomes binding upon all the parties hereto instantly upon

[Enterprise Lumber Co., et al. v. First Nat. Bank.]

the said \$25,000 being deposited in the said banks according to the tenor of this contract and the passing and approval of the said ordinances by the town of Dothan."

Exhibit B.

"It is agreed, and this agreement forms a part of this contract, that the said Enterprise Lumber Company guarantees that its said railroad to be built under this contract shall give to the town of Dothan no higher rates of freight than other well-regulated railroads and well-operated railroads give to other towns similarly located. The meaning of this is that the rate shall be no higher to Dothan than to a city or town of similar size with equal facilities and of a similar distance from the port. It is agreed that the foregoing forms a part of the contract theretofore signed and delivered on the 2d day of June, 1903, between the parties hereto, and is effective in accordance with the said contract heretofore signed and delivered."

Exhibit C.

"Dothan, Ala., July 5, 1905.

"Received of the Enterprise Lumber Company the following sums of money from the following parties: R. H. Walker, \$100; H. A. Pearce, \$250; Malone & Sons, \$5,000; J. T. Fowler, \$25; H. Watford, \$50; W. W. Whiddon, \$25; J. T. Thrasher, \$400; B. G. Farmer, \$2,500; J. E. Wise, \$50; Ed Nix, \$100; R. C. Granberry, \$25; W. M. Hunter, \$200; B. Faulk, \$50; A. D. Whiddon, \$25; T. M. Espy, \$500; N. B. Crawford, \$250; W. S. Wilson, \$250; J. U. Cureton, \$500; E. R. Porter, \$500; Reid & Hill, \$100; D. C. Carmichael, \$1,000; D.

[Enterprise Lumber Co., et al. v. First Nat. Bank.]

Douglas, \$50; John and J. G. Sanders, \$1,000; J. R. Young, \$100. Total, \$13,050. The said foregoing amounts are to be paid out by this bank in accordance with a contract made by said foregoing parties with the said Enterprise Lumber Company, on the 2d day of June, 1905."

CANDLER, THOMSON & HIRSCH, and PHARES COLEMAN, for appellant. The averment of an affirmative fact in a bill in equity which is essential to the relief prayed for must be proved in order to entitle the complainant to the relief asked for; such averments cast upon the complainant the burden of proving the fact so alleged.—18 Cyc. 371; *Lehman v. McQueen*, 65 Ala. 570; *Wolfe v. Nall*, 62 Ala. 24; *McRae v. McDonald*, 57 Ala. 423; *Marlowe v. Benagh*, 52 Ala. 112; *Hawes v. Brown*, 75 Ala. 385; *Wilkinson v. Searcy*, 74 Ala. 243; *Evans v. Winston*, 74 Ala. 349; *Pruitt v. Holly*, 73 Ala. 369. The failure of a complainant in a bill in equity to prove the essential averments of his bill defeats his right to the relief prayed for.—*Hughes v. Hughes*, 87 Ala. 655; *Lehman v. McQueen*, 65 Ala. 570. The essential elements of a bill of interpleader are four: (1) The same thing, debt or fund must be claimed by each of the parties against whom the relief is sought; (2) all adverse titles or claims must be dependent or derived from a common source; (3) the person asking the relief must not have or claim any interest in the subject matter; (4) Complainant must have incurred no independent liability to either of the claimants.—4 Pomeroy Eq. Juris., sec. 1322, et seq.; *Gibson v. Goldthwaite*, 7 Ala. 281; *Conley v. Ala. Gold Life Ins. Co.*, 67 Ala. 472; *Kyle v. Mary Lee Coal & R. Co.*, 112 Ala. 606; *Third Natl. Bk. of Boston v. Skillings*, 132 Mass. 410; *Cross v. M. & O. R. R. Co.*, 96 Ala. 447; Fletcher's Eq. Pl. & Pr. Jrs., 452-4

[*Enterprise Lumber Co., et al. v. First Nat. Bank.*]

and notes; *Conn. Mutual L. I. Co. v. Tucker*, 23 R. I. 1; 91 Am. St. Rep. 590; Note 593; *City of Mt. Pelia v. Capital Savings Bank*, 75 Vt. 433; 98 Am. St. Rep. 834. The inflexible rule to justify an interpleader is that the thing or fund to which the parties defendant make claim must be one and the same thing; that is, it must be identical. Where the claims made by the defendants are of different amounts they never can be identical.—4 Waites on Actions & Defenses, 153; 11 Enc. of Pl. & Pr., 453; *Pfister v. Wade*, 56 Cal. 43; *School District v. Weston*, 31 Mich. 85; *Glyn v. Duesberry*, 11 Sim. 139; *Diplock v. Hammond*, 27 Eng. L. & E., 202. A bill of interpleader will not lie to compel parties claiming a particular fund to interplead and settle the question of right to the fund between themselves where the plaintiff is fully advised of the grounds of the claims of the parties defendant, as well as the nature and extent of his liability to each. This is true, because being thus in possession of requisite knowledge, it devolves upon the complainant to determine to which of the claimants he should make the payment.—*Morgan v. Filmore*, 18 Abb. Prac. 217; *Trigg v. Hitz*, 17 Abb. Prac. 436; *Shaw v. Koster*, 8 Page (N. Y.) 339; *Pfister v. Wade*, 56 Cal. 43; *Parker v. Barker*, 42 N. H. 78; *Hechmer v. Gilligan*, 28 W. Va. 750. A bill of interpleader can not be sustained when it is shown that as to either of the defendants the plaintiff is a wrongdoer.—*Conley v. Ala. Gold Life Ins. Co.*, 67 Ala. 472; *Crane v. Burntrager*, 1 Ind. 165; *Mount Holly, etc., Turnpike Co. v. Ferree*, 17 N. J. Eq. 117; *Shaw v. Koster*, 8 Paige (N. Y.) 339; *Fulton Bank v. Chase*, (Supreme Ct.), 6 N. Y. Supp. 126; *American, etc., Tel Co. v. Day*, 52 N. Y. Super. Ct. 128 *Dodge v. Lawson*, 22 Civ. Pro. Rep. (N. Y.) 112; *McWhorter v. Hatfield*, 40 Ga. 269.

[Enterprise Lumber Co., et al. v. First Nat. Bank.]

ALBERT E. PACE, for appellee. Interpleader was the proper remedy.—*Wheeler v. Armstrong*, 164 Ala. 452; *Kyle v. Mary Lee Co.*, 112 Ala. 606; *Cross v. M. & C. R. R. Co.*, 96 Ala. 408; *Conley v. A. G. L. I. Co.*, 67 Ala. 470; 3 Pom. Eq., secs. 1322-26; 11 Enc. P. & P. 444. The complainant is not robbed of his remedy because several claimants claim different portions of the fund.—98 Am. St. Rep. 834; 1910 Ann., vol. 8; 120 S. W. 543; 92 Ark. 446. The Enterprise Lumber Company is estopped from disputing the equity of the bill for the right of interpleader.—*Wheeler v. Armstrong*, *supra*.

DE GRAFFENRIED, J.—The reporter will set out in his report of this case Exhibits A, B, and C, to the bill of complaint.

It will be seen from Exhibit A, above referred to, that the Enterprise Lumber Company had, when the said contract was made, in contemplation the building of a railroad from Dothan, Ala., to some deep-water harbor on the Gulf of Mexico and that, before undertaking the work, it was desirous of obtaining, and did obtain, from the citizens of Dothan, and from the city of Dothan, certain subscriptions in money, and certain valuable concessions. It will also be seen from Exhibit C that the contemplated \$25,000—referred to in Exhibit A—was raised through subscriptions of certain named citizens, and that something over one-half of that sum was deposited in the First National Bank of Dothan. It will be seen also from said Exhibit A that it was understood that a part of the money subscribed was to be paid when the contemplated railroad was completed from Dothan to the Pensacola & Atlantic Division of the Louisville & Nashville Railroad.

After making the contract, of which Exhibit A is a copy, the Enterprise Lumber Company proceeded to

[Enterprise Lumber Co., et al. v. First Nat. Bank.]

construct said railroad, and when the road had been completed to the Pensacola & Atlantic Division of the Louisville & Nashville Railroad it claimed, and was paid, that part of the money to which it was then, under the terms of said Exhibit A, entitled. The Lumber Company then proceeded with the work, and finally completed the railroad to a point on St. Andrews Bay, which bay is, in fact, a part of the Gulf of Mexico. When this was done, the Lumber Company claimed that it had fully performed its obligations as fixed by the contract of which Exhibit A is a copy, and claimed the balance of the said fund remaining in the hands of the said First National Bank of Dothan. Nearly all of the subscribers to said fund—their names are set out in Exhibit C to the bill of complaint—thereupon claimed that said Lumber Company had not complied with the terms of said contract, and notified the said bank not to pay over the money remaining in its hands which they had subscribed to said fund. Thereupon the said First National Bank of Dothan paid into court that part of the fund, i. e., \$7,826.01, which represented the fund remaining in its hands, which had been subscribed by those parties who had notified it not to pay the remainder of their said subscriptions to said Lumber Company, and filed the present bill.

The bill sets up the facts in extenso, makes the Lumber Company and the other claimants of said fund respondents thereto, alleges that the complainant has no interest in said fund, and prays that the said Enterprise Lumber Company and the other respondents to the bill of complaint be required to interplead as to the said sum so on deposit with the complainant, and under appropriate orders of the court that the respective rights of the several respondents to said sum be adjudicated and determined by said court. The bill—or rather the

[Enterprise Lumber Co., et al. v. First Nat. Bank.]

bill as amended—is sworn to, and the affidavit contains the usual and necessary statements that the allegations of the bill are true, that it is not filed by the complainant to delay the payment of the sum so held by it, and that the complainant is not in collusion with any of the respondents, but that it is filed by the complainant of its own accord for the purpose of obtaining the relief sought, and not for the purpose of giving one of the claimants an advantage over any of the other claimants.

1. In order to maintain a bill of interpleader the complainant must allege in his bill, and show by his proof, that the subject of the rival claims is, in fact, claimed by both or all the rival claimants; that all the rival claims are through one common source; that the complainant does not have or claim an interest in the subject of dispute; and that he has incurred no independent liability to either of the claimants, but that he is in a position of absolute indifference as a mere stakeholder. The common source of all the rival claims in this case is the contract of which Exhibit A is a copy. The rights of all the respondents to the fund in controversy grow out of, and are fixed by, the terms of that contract. If under the terms of the contract the Lumber Company itself is not entitled to the fund—if it has failed to carry out its contract—then the complainant holds the fund for the benefit of those who raised it and placed it in the bank. Their rights to the fund spring out of the failure of the Lumber Company to comply with the terms of the contract.

It is evident, also, that the complainant occupies a position of a mere stakeholder, and that it has not, under the terms of the contract to which we have above referred, when that contract is properly construed and the purposes for which it was entered into by the parties are considered, any interest whatever in said fund. It

[Enterprise Lumber Co., et al. v. First Nat. Bank.]

is also evident that the complainant has not, within the true meaning of the law, incurred any liability to either one of the claimants. While it is true the fund was kept, not in a safety vault separate from the funds of the bank, but simply as other deposits subject to check, and for that reason became a mere debt of the bank, nevertheless the contract of which Exhibit A is a copy alone determines to whom that debt belongs; and, under the disputed issues of fact between the Lumber Company and the other claimants of the fund shown by the bill of complaint, it is for the courts, and not for complainant, except at its own peril, to determine those issues of fact. The complainant does not deny the existence of the debt, and as an evidence of good faith pays the money into court. The trouble with complainant is that, owing to the rival claims of the respondents, it cannot pay that debt, or any part of it, to any one of the respondents except at its own peril.

2. It is, however, earnestly insisted that, as the respondents who deny the Lumber Company's right to the fund each claims, in severalty, only a portion of the fund, it cannot therefore be said that the parties respondent make claim to one and the same thing. Says the appellant Lumber Company: "Where the claims made by the defendants are of different amounts they never can be identical." That is to say, that while the Lumber Company claims the whole amount of the fund, no other respondent claims the whole, but only a part of the fund, and that therefore the bill is without equity as a bill of interpleader. In other words, according to the contention of the Lumber Company, the complainant should have filed, not one bill of complaint to settle this entire controversy between the parties, but as many bills as there were rival claimants to parts of the fund, although such rival claimants, in the aggregate, claim

[Enterprise Lumber Co., et al. v. First Nat. Bank.]

the whole fund and claim it through one contract, of which Exhibit A is the written memorial.

Equity abhors a multiplicity of suits and undertakes to settle all disputes about any one matter in one suit, when under its rules, reasonably interpreted, this can be done.—Sims Chancery Practice, p. 101, § 159.

The above contention of the Lumber Company has, in reality, for its basis a statement in *Glyn v. Duesberry*, 11 Sim. 139, 148, in which Shadwell, V. C., said: "Where the claims made by the defendants are of different amounts they can never be identical." This quoted sentence has been much criticized, and is not only opposed to reason, but to the great weight of modern authority. Commenting on the quoted sentence, Mr. Pomeroy says: "Another insistence of difference in the amounts claimed by the different defendants, where the debt or duty may still be the same, occurs in cases where, a fund being in plaintiff's hands, the whole of it is claimed by one defendant and parts of it by others. In regard to such cases, Christiancy, J., said, in *School District v. Weston*, 31 Mich. 85, 'Upon the great weight of authority, both English and American, a much more liberal and reasonable rule has been established, and bills of interpleader have been frequently maintained, where the several claimants, instead of claiming the whole fund or matter in dispute, have claimed different portions of the fund, when the aggregate of all the claims exceeded the full amount of the fund.'"—5 Pomeroy, Equity Jur. (Pomeroy's Equitable Rec. vol. 1), p. 73, § 45. See, further, on this subject *Packard v. Stevens*, 58 N. J. Eq. 489, 46 Atl. 250; *Chicago, Rock Island & Pacific Railway Co. v. Moore*, 92 Ark. 446, 123 S. W. 233; *Guess v. Stone Mountain Granite & Railway Co.*, 67 Ga. 215; *Fidelity, etc., Ins. Co., v. Savings Bank*, 110 Ill. App. 92.

[Enterprise Lumber Co., et al. v. First Nat. Bank.]

In our opinion the bill of complaint was not subject to the demurrer which was interposed to it.

3. The position assumed by the Lumber Company that the amount due the respondent subscribers to the fund if they are entitled to recover the fund, does not equal the amount admitted to be due and paid into court does not appear to be sustained by the facts. The mere fact that after the bill of complaint was filed and the money paid into court some of the subscribers withdrew their claim to the fund can, in no way, affect the equity of the bill of complaint. As to such subscribers the chancellor made an appropriate order authorizing the complainant to pay the part which they claimed to the Lumber Company. Those subscribers and the parts of the fund claimed by them have simply disappeared from this litigation.

4. It appears that a few of the subscribers to the said fund were interested in, or customers of, a bank other than the First National Bank of Dothan, and that the First National Bank of Dothan permitted those subscribers to place their money deposit with the said bank in which they were interested or of which they were customers. The Lumber Company advances this fact as an argument in support of its theory that the complainant has failed to prove the allegations of its bill of complaint. The mere fact that the First National Bank of Dothan permitted some of the money, which it had acknowledged as a deposit with it, to be actually deposited in some other bank is a matter of which the Lumber Company in this proceeding certainly has no right to complain. We have already said that the deposit of the fund in the First National Bank of Dothan was not a special deposit. It was a general deposit and to the knowledge of all the parties went into, and was commingled with, the general funds of the bank. The

[Ashurst, et al. v. Ashurst.]

thing in litigation in this case is a debt due by a bank to a depositor, and the only question is, to whom or to what persons does this debt belong?

5. We have above discussed the only questions which can prove of interest. Counsel for the Lumber Company undertake, in several ways, to show that the complainant has failed to sustain by sufficient evidence the material allegations of its bill of complaint. These arguments of counsel involve only a discussion of the facts, and we do not deem it necessary to reply to them. It is sufficient for us to say that, in our opinion, the complainant sustained by its evidence the material allegations of the bill of complaint, and that the decree of the court below is free from error.

Affirmed.

DOWDELL, C. J., and ANDERSON and MAYFIELD, JJ.,
concur.

Ashurst, et al. v. Ashurst.

*Bill to Remove Settlement from Probate to Chancery
Court and to Construe a Will.*

(Decided February 11, 1913. 61 South. 942.)

1. *Wills; Construction.*—Every will, deed or other written instrument should be so construed, if possible, as to give some effect thereto.

2. *Perpetuities; Restraint of Alienation for Term of Years.*—The will considered, and it is held that the purpose of the testator to vest in each of his children an interest of one-sixth of his estate directed to be sold, subject to "the previous life estates limited herein," the will devising certain land to each of three sons for their several lives respectively, and on their several deaths within twenty-five years after his death to their children, or, if there were no children, to the surviving donees until the expiration of twenty-five years, was void, since, notwithstanding the recital that his purpose was to vest an interest in the remainder subject to the previous life estates, the will created no previous life estates, but devised to the sons and their children a term of twenty-five years which could not be done under the provisions of section 1030, Code 1896.

[Ashurst, et al. v. Ashurst.]

APPEAL from Tallapoosa Chancery Court.

Heard before Hon. W. W. WHITESIDE.

Bill by Gillie D. Ashurst against Harry G. Ashurst and others for removal of an estate from the probate to the chancery court, to construe a will and for instructions to the executor. Decree for complainant, and respondents appeal. Affirmed.

See, also, 175 Ala. 667, 57 South. 442.

The will of J. V. Ashurst, executed January 3, 1903, is as follows:

"Item 1. I am desirous of securing my children as far as possible in a decent subsistence, against the accidents and misfortunes of life, on which account, and because I think real estate will greatly enhance in value, I make this somewhat peculiar will, postponing a final division of my land for a considerable period."

"Item 3. I give to my son Harry G. Ashurst what is known as my home plantation, where, at the date of this will, I reside, lying in Tallapoosa and Macon counties, containing 1,490 acres; and to my son Wade Hill Ashurst, my Frank Ashurst place in the same counties, containing about 760 acres of land, lying on the east of my home place; and to my son R. L. Ashurst, my Burney place in Tallapoosa county, west of the homestead, containing about 800 acres; these three places shall go to and belong to said several donees, for their several lives respectively, and on their several deaths, within twenty-five years after my death, to their several children, if any living, until the expiration of twenty-five years after my death, and in the event of no children of the several donees, then to the survivors of the said three donees, then living, and on their death to their children until the end of twenty-five years after my death, except that if any such donees (my three said sons) become bankrupt or insolvent or execute any

[Ashurst, et al. v. Ashurst.]

mortgage on said property so given to them severally or suffer any execution or any process for the payment of debt to attach to such share so given to such donee, under which said property shall be advertised for or exposed for sale, then in that event the estate of such donee shall thereupon cease and terminate absolutely, and at once vest in the children equally of such donee, and in default of living children at such date, to the other of said three donees, my children, then living, equally; and if the others of said donees be dead, then to their children equally per stirpes, during the life of such donee, whose estate is thus terminated and until the period for final division of my estate hereinafter provided for."

"Item 8. At the end of twenty-five years from my death, the lands embraced in the said three places devised to my said sons, Harry, Wade H. and R. L. are directed to be sold at public auction in lots or bodies likely to suit purchasers, for one-third cash, the balance at one and two years with interest, and deeds shall be made and mortgages taken back for credit portion of the purchase money, and after paying the expenses of the sale, the entire proceeds including cash and time notes shall be equally divided among my six children now living; if any child should be dead, his heirs, descendants or devisees shall take the share of such child as he or she may provide by will, and in case of no will as the law provides in the case of intestacy; the purpose hereof being to vest in each of my children an interest of one-sixth of such estate directed to be sold subject to the previous life estates limited therein."

JAMES W. STROTHER, for appellant. It cannot be contended that the devisees, and the devise to them come within the definition of a perpetuity.—Gray on Perpet-

[Ashurst, et al. v. Ashurst.]

unities, sec. 201; *Lyons, et al. v. Bradley*, 168 Ala. 505. Every deed or devise should be given some effect vesting an estate.—*Dean v. Mumford*, 102 Mich. 510; 140 N. Y. 135. The law presumes conclusively that the testator intended the limitation to take effect within the lawful period.—89 Tenn. 219; 61 Conn. 13; note to *In re Walkerly*, 49 Am. St. Rep. 126. Vested interests are not subject to the rule against perpetuities.—*Lyons v. Bradley, supra*; 80 Am. St. Rep. 625; Gray on Perpetuities, sec. 205. All the devisees under the will of Ashurst took vested interest, and this is especially true as to H. G., W. H., and R. L. Ashurst.—*Lyons v. Bradley, supra*; *Smaw v. Young*, 109 Ala. 528. A devise valid within itself will not be defeated by subsequent invalid conditions.—*Lyons v. Bradley, supra*; *Robertson v. Hayes*, 83 Ala. 290.

WILLIAM F. THETFORD, and STUART MCKENZIE, for appellee. For a former report of this case see *Ashurst v. Ashurst*, 57 South. 442. The attempted devises are directly in the face of the provisions of section 1030, Code 1896, and are, therefore, void.—*Lyons v. Bradley*, 168 Ala. 505. The so-called life estate cannot be preserved.—*Lyons v. Bradley, supra*. The ulterior estates cannot be upheld as leases.—Tiedman on Real Property; secs. 172, 183-4; *Lyons v. Bradley, supra*.

DE GRAFFENRIED, J.—The reporter will set out, in his statement of the facts of this case, items, 1, 3, and 8 of the will, which, in this case, we are called upon to construe.

1. Section 1030 of the Code of 1896, which controls the provisions of this will, is as follows: "Lands may be conveyed to the wife and children, or children only, severally, successively and jointly; and to the heirs of

[Ashurst, et al. v. Ashurst.]

the body of the survivor, if they come of age, and in default thereof, over; but conveyances to other than the wife and children or children only, cannot extend beyond three lives in being at the date of the conveyance, and ten years thereafter."

Under the above will Mr. Ashurst did not attempt to devise the *lands* described in item 3 of the will to his three sons "severally, successively and jointly, and to the heirs of the body of the survivor if they came of age, and in default thereof, over." He undertook to devise to his three sons, and, under certain conditions, to their children, a *term of 25 years*—a chattel real—in the said lands. While he declares, at the end of item 8 of the will, that it was his purpose to *vest* in each of his six children an undivided one-sixth interest in remainder in the said lands, subject to the previous life estates limited in item 3 of the will, the truth is that he had not in item 3 created a previous life estate in said lands. To so construe the provisions of item 3 of the will would be to juggle with mere words. Item 3 simply and plainly creates a term of 25 years in said lands and declares who shall enjoy that term.

The above is not only true, but the purpose of the testator in creating the term of 25 years is not left in doubt. The purpose he himself in item 1 plainly declares was to secure to his children a decent subsistence against the accidents and misfortunes of life and to postpone, for a considerable period, a final division or sale of the lands described in item 3 of the will. The open purpose of the testator in items 3 and 8 of his will was to so fetter the lands described in said terms as to render their sale in any way, by any person or by any court, impossible until a period of 25 years had elapsed after his death. "The rule against perpetuities is a restraint imposed for reasons of public policy by the law

[Ashurst, et al. v. Ashurst.]

upon an owner's power to dispose of property. Every deed and will is therefore to be construed as though no rule against perpetuities existed. The intention of the owner having been thus determined, the rule is to be applied."—30 Cyc. p. 1498. So construing the will in question, it seems to us that the provisions of items 3 and 8 are offensive to our statute against perpetuities and are therefore void. If Mr. Ashurst had the power to so fetter the lands, to which we have above referred, for a period of 25 years, he had the power to prevent their sale for a much longer period, and to so hold would be, in effect, to strike the above-quoted statute against perpetuities from our Code. The Legislature has seen fit to declare that the measure of the period during which the right to alienate lands may be suspended shall be determined by *human lives*, and the provisions of this will are clearly offensive to the above-quoted provision of our Code.

2. We recognize that some effect, if possible, should be given to every will, deed, or, as to that matter, to every written instrument. We have, however, no authority to make a will for Mr. Ashurst nor to say what he would have done with his property if he had not, when he made his will, labored under the erroneous impression that he had the power to postpone a sale of his lands for the definite period of 25 years after his death. This term of years was created by Mr. Ashurst as a part of his scheme to prevent the alienation of the lands for a period not permissible under the law, and it "happens that whenever a testator, through temerity or ignorance, violates the plain mandate of the statute, as in this case, and creates a trust by which the absolute power of alienation is sought to be suspended for a term of years, he must pay the penalty of his rashness or folly in the destruction of his cherished design."—*In re*

[Ashurst, et al. v. Ashurst.]

Walkerly, 108 Cal. 627, 41 Pac. 772, 49 Am. St. Rep. 97; *Lyons, et al. v. Bradley*, 168 Ala. 505, 53 South. 244.

It seems to us that the vital points at issue in this case were fully considered and determined by this court in the case of *Lyons, et al. v. Bradley, supra*. In that case, as in this, a plain effort was made by the testator to evade our statute against perpetuities, and in this case, as in that, the result must be the same. Estates and interests created in lands, whether directly or through the medium of a trustee, which offend the above-quoted provision of our Code, are void.—*Lyons, et al. v. Bradley, supra*.

3. The above-quoted section 1030 of the Code provides, among other things, that lands may be conveyed so as to extend the estate conveyed for a period of three lives in being and *ten years thereafter*. Section 3410 of the Code of 1907 also provides that “no trust of estate for the purpose of accumulation only can have any force or effect for a longer term than ten years.” This period of “ten years” fixed in the above sections of the Code may evidence a legislative license to testators and grantors to so fetter the estates devised or granted by them as to prevent their alienation for a *fixed* period of *ten* years, but certainly not longer. This question is not before us, and it is therefore unnecessary for us to determine it.

The decree of the court below is affirmed.

Affirmed.

DOWDELL, C. J., and ANDERSON and MAYFIELD, JJ.,
concur.

[Webb v. Gray.]

Webb v. Gray.*Libel and Slander.*

(Decided April 10, 1913. 62 South. 194.)

1. *Libel and Slander; Instructions; Assuming Damages.*—In an action for slander for words actionable per se where defendant pleaded the truth of the words as a justification under section 3746, Code 1907, a charge that if defendant had not reasonably satisfied the jury that the plea was true, they might consider the plea as a reiteration of the slander, and as an aggravation of damages, is not objectionable for assuming damages for the plaintiff, as the law presumes damages in such case.

2. *Same; Aggravation of Damages.*—Under section 3746, Code 1907, the filing of a plea setting up the truth of the charge is not an aggravation of the damages, unless there is a total failure of proof to sustain the plea, and the circumstances evince malice in reiterating the slander, or a reckless disregard of the consequences of filing such plea.

3. *Same; Evidence; Statement of Third Person.*—In an action for slander brought by a woman, the declarations of her alleged paramour made to persons other than defendant as to his conduct with plaintiff, or as to his conduct generally, and as to his reasons for leaving the community, are hearsay and inadmissible, even under the statute allowing the circumstances under which the words were spoken to be proven in mitigation of damages.

4. *Same; Letters of Plaintiff.*—In an action for slander letters purporting to be from plaintiff to a man, which were only connected with her by the hearsay statements of the recipient, or by the fact that they were written in a lady's hand, purporting to be signed by plaintiff's first name and handed to the recipient by her nephew, were not admissible as admissions of the truth of the acts charged, but where they were shown to defendant, they are admissible in mitigation as tending to show a reasonable belief by defendant of the truth of the statements attributed to him.

5. *Same.*—The testimony of another witness corroborative of defendant, that such letters were shown to defendant by the recipient, and that they were delivered to recipient by the nephew of plaintiff, are admissible, but it was not error to exclude evidence as to what the witness saw the recipient do when not in the presence of defendant.

6. *Same; Motive of Defendant.*—Evidence that defendant purchased the business of the man with whom he stated that plaintiff had had improper relations, was admissible to show that he had a motive in getting rid of such person, and started the report maliciously.

7. *Same; Truth; Justification.*—In an action for slander charging plaintiff with improper relations, evidence of the existence of rumors

[Webb v. Gray.]

and reports concerning her was not admissible to establish the truth of the statements made by defendant.

8. *Same; Instructions; Effect of Evidence.*—Where there was evidence of common report of improper relations on plaintiff's part, and that her paramour had fled because of such reports, it was not error to refuse a charge that the jury might consider the fact of such flight in determining the truth of the rumors.

9. *Same.*—A charge asserting that if plaintiff's paramour was the sole source of the rumors concerning plaintiff, the jury could not find a verdict for her, was manifestly erroneous.

10. *Same; Reputation of Defendant.*—It was not error to refuse to charge that in a libel suit the defendant is not permitted to offer evidence of his good reputation, and that he is presumed to be of good reputation until the contrary appears, which presumption, when considered in connection with the other evidence may raise a reasonable doubt as to the truth of the charge against the defendant.

11. *Same; Punitive Damages.*—In an action for damages for speaking words slanderous per se, it is for the jury to determine whether plaintiff is entitled to punitive damages or not.

12. *Same; Complaint; Amendment.*—Under section 5369, it was permissible for plaintiff to amend her complaint for slander of plaintiff, "an unmarried woman," by adding counts which charged defendant with speaking the same words concerning plaintiff "then, and ever since, an unmarried woman."

13. *Appeal and Error; Harmless Error; Evidence.*—The admission of hearsay testimony favorable to the appellant is harmless error.

14. *Evidence; Hearsay.*—Hearsay statements are not admissible as tending to prove plaintiff's general character, or of the truth of the words alleged to constitute the slander.

15. *Same; Secondary Evidence; Letters.*—After showing that the recipient, in whose possession the letters were last seen, was out of the state, it was competent to prove the contents of such letters by secondary evidence.

APPEAL from Anniston City Court.

Heard before Hon. THOMAS W. COLEMAN, JR.

Action by Era Gray against Ed. J. Webb for damages for libel and slander. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The original complaint contained four counts, charging the defendant with falsely and maliciously speaking of and concerning the plaintiff, an unmarried woman, in the presence of divers persons, words set out, thereby imputing to her a want of chastity; the words and inferences being stated to be that she had had

[Webb v. Gray.]

sexual intercourse with Jim Lockridge. The fifth and sixth counts were later added by way of amendment over the objection of the defendant, and were based upon the same state of facts, and charged words imputing unchastity to plaintiff, then and ever since, an unmarried woman. The defendant filed two pleas, one the general issue, and the other that the statement or language alleged to have been uttered were true statements of existing facts, and that plaintiff was at the time of the utterances made by the defendant guilty of the matters charged. Charge A given for the plaintiff was as follows: "The court charges the jury that the defendant has interposed in this case a plea of justification; that is, a plea averring the truth of the charges alleged to have been made by him against the plaintiff, and the court charges the jury that, if the defendant has not reasonably satisfied the jury by the evidence that this plea is true, the jury may consider the said plea as a reaffirmation of the slander, and as an aggravation of the injury and damages sustained by the plaintiff." The part of the oral charge made the basis of assignment 30 is as follows: "Proof of the existence of rumors and reports in respect to the chastity of plaintiff will not be admitted in evidence in this case for the purpose of establishing the truth of any charge that may have been made by the defendant reflecting upon the chastity of the plaintiff." The following charges were refused to the defendant: (6) "If Jim Lockridge was the sole source of the rumors or reports that might have been current in Piedmont, in respect to the chastity of plaintiff, then you cannot find a verdict for the plaintiff." (7) "If you believe that there was a common rumor or report obtaining in Piedmont to the effect that the relations between plaintiff and Jim Lockridge were improper, and that because of the rumor Lockridge fled

[Webb v. Gray.]

from the community and has not since returned nor satisfactorily explained his flight, you may consider such flight in determining the question as to whether such rumors were true or not." (12) "Against finding vindictive or exemplary damages." (14) "I charge you that the good reputation of defendant, Webb, is presumed to exist, and will be presumed to exist until the contrary is established by competent testimony." (16) "It is a presumption of law that the defendant, Webb, is a man of good reputation, and that this presumption of law, that his reputation is good, when considered in connection with the other evidence in the case, may generate a reasonable doubt of the truth of the charges alleged against the defendant." (17) "Under the rules of evidence defendant, Webb, was not permitted to offer evidence of his good reputation. Such reputation is presumed to exist until evidence is offered to the contrary."

Transferred from Court of Appeals under Act of 1911, § 6, p. 449.

H. D. McCARTY, and T. BEN KERR, for appellant. The court erred in giving plaintiff's charge A.—*O'Neal v. McKenna*, 116 Ala. 409; *Ferdon v. Dickens*, 161 Ala. 181; sec. 3746 and 5331, Code 1907; 7 Am. Rep. 367; 21 L. R. A. 499; 25 Cyc. 416, 417, 478, 479, 480 and 547; 18 A. & E. Enc. of Law, 1104, et seq. Assignments of error 9, 10, 11, 12, 13, 14 and 15, all relates to the admission and exclusion of evidence as to the action of Lockridge, with whom the improper relations are alleged, and the court erred in its action thereon, to the great damage of defendant.—*Hereford v. Combs*, 126 Ala. 380; *Fuller v. Dean*, 31 Ala. 658; *Bradley v. Gibson*, 9 Ala. 408; *Chamblee v. McPherson*, 11 Ala. 920. The court erred in its act in excluding the letters, and the

[Webb v. Gray.]

evidence offered relative thereto.—3 Elliott on Evid. parag. 2458; 15 Am. St. Rep. 399; 25 Cyc. 517; *Long v. Rogers*, 19 Ala. 332; *Kennedy v. Deere*, 6 Port. 98; *Arrington v. Jones*, 9 Port. 142. The court erred in excluding the testimony of Dr. VanZant. Counsel discuss the charges refused defendant in the light of the above authorities, and insist that the court was in error in its action thereon.

KNOX, ACKER, DIXON & STERNE, for appellee. Nothing can be considered on this appeal except the overruling of the motion for new trial.—*Banks v. Wilkes*, 132 Ala. 573. The words charged were actionable per se, and the law presumes damages.—*Johnson v. Robertson*, 8 Port. 489; 25 Cyc. 453, 531 and 539; Newell on Defamation, 779. The failure to sustain a plea of justification may be considered an aggravation of damages: *Hereford v. Combs*, 126 Ala. 367; *Robinson v. Drummond*; *Toole v. Deever*s, 30 Ala. 672; sec. 3746, Code 1907; *Bush v. Prosser*, 11 N. Y. 347; 31 N. E. 918; 118 N. Y. 178. There was no error in the action of the court on the evidence relative to the common report, and to the action of the man charged to have been the person with whom plaintiff maintained improper relations.—25 Cyc. 492, 506; 59 Am. St. Rep. 319; *A. C. G. & A. Ry. Co. v. Appleton*, 117 Ala. 329; *Scott v. McKinish*, 15 Ala. 662; 12 Irredel 284; 23 Pa. St. 95; 15 Mo. 480; 3 Barb. 210. There was no error in the court's oral charge.—81 Ind. 527. There was no error in giving or refusing the charges requested.—18 A. & E. Enc. of Law, 1092. The complaint was properly amended under section 5367, Code 1907.

ANDERSON, J.—Charge A, given at the plaintiff's request, was directed at defendant's plea of justifica-

[Webb v. Gray.]

tion, and was not objectionable for assuming the existence of damages to the plaintiff because of the defamation, for the reason that in actions of libel and slander it is not necessary that the plaintiff either allege or prove any special damage. The words charged in this case are actionable per se (Code of 1907, § 3748), and it is settled that, "if the defamatory charge is actionable per se, the plaintiff is entitled to at least some damages; the law presuming damages."—25 Cyc. pp. 453, 531, 539. "When words are slanderous in themselves, the right to damages follows as a consequence from speaking in a slanderous way, because it is the incalculable tendency of slander to injure the person slandered, in his reputation, profession, trade, or business. It would frequently be difficult to prove any pecuniary injury from slander, and always impossible to establish its full extent. * * * Therefore, when words are actionable in themselves, the law implies damages."—*Johnson v. Robertson*, 8 Port. 489; *Newell on Defamation, etc.*, p. 779. The case relied upon by counsel for appellant, namely, *O'Neal v. McKinna*, 116 Ala. 606, 22 South. 905, was an action for malicious prosecution, and the charges pointed out as bad assumed that the plaintiff suffered wounded feelings and injured reputation. The court said: "Charges C and D, given for the plaintiff, would therefore have been properly given if they had not assumed the fact, instead of leaving it to the jury to determine, that the plaintiff had suffered wounded feelings and injured reputation. In fact, we see no evidence to show injured reputation." The law does not presume damages in an action for malicious prosecution.—25 Cyc. p. 60. These principles of law clearly distinguish the case at bar from the *O'Neal Case*, since in this case the law presumes or implies damages, while

[Webb v. Gray.]

in the action for malicious prosecution damages are not presumed but must be proven.

It is next insisted that charge A, given for the plaintiff, was bad for the reason that it authorized the jury to consider a failure to sustain the plea, setting up the truth of the words spoken in bar of the action, as an aggravation of the damages, whether the plea was or was not interposed in good faith. Under our system of pleading, in actions of this nature, the defendant may not only plead specially the truth of the words spoken in bar of the action, but may also give in evidence, under the general issue, the truth of words spoken or written, or the circumstances under which they were written or spoken in mitigation of the damages. Section 3746 of the Code of 1907; *Schuler v. Fisher*, 167 Ala. 184, 52 South. 390; *Ferdon v. Dickens*, 161 Ala. 181, 49 South. 888. "When the truth is pleaded in justification, failure to sustain the plea by proof may be considered by the jury as an aggravating circumstance in estimating damages. But the jury should be guided by the motive with which the plea is made; hence if it is interposed in good faith, under an honest belief in the truth of the matter published and with reasonable grounds for such belief, it cannot be regarded as an aggravation beyond the real injury sustained by the plaintiff. Indeed, it has been held that if a plea of justification is made in good faith, and evidence is introduced, honestly for the purpose of supporting it, such evidence should be considered by the jury in mitigation of damages, although it is insufficient to prove the truth of the plea."—25 Cyc. pp. 416, 417, and cases cited in notes 39 and 40. Indeed, this seems to be the rule which obtains in all the states except Alabama and perhaps two others. The Oregon and New York statutes, as to pleas in justification and the right to mitigate damages in ac-

[Webb v. Gray.]

tions of libel and slander are, in effect, the same as ours, and were enacted for the same purpose, that is, to remove, to a certain extent, the harshness of the common law, so as to permit the jury to consider the facts adduced in mitigation of damages, other than actual or real, if they tend to show good faith or belief in the truth of the words spoken, although said facts do not sustain the plea of justification to the satisfaction of the jury. But when there is a total failure of proof tending to establish the truth of the charges, and the circumstances evince malice in reiterating the slander, or such reckless disregard of the consequences of interposing such a plea which is not supported by evidence to show that the defendant had a probable or reasonable belief of the truth of same, the jury may look to the interposition of such a plea as a reiteration of the slander and as an aggravation of damages. A charge similar to this one has been characterized by a most respectable court as a "legal monstrosity." It penalizes an unsuccessful defense, whether made in good faith or not, and notwithstanding the law authorizes the facts proven to go in mitigation of damages under the general issue, although not sufficient to establish the plea of justification.—*Upton v. Hume*, 24 Or. 420, 33 Pac. 810, 21 L. R. A. 493, 41 Am. St. Rep. 863; *Klinck v. Colby*, 46 N. Y. 427, 7 Am. Rep. 360. We therefore hold that the trial court erred in giving charge A at the request of the plaintiff.

The trial court, however, found justification for giving said charge in the cases of *Hereford v. Combs*, 126 Ala. 369, 28 South. 582, and *Poole v. Devers*, 30 Ala. 672, wherein charges similar to this one were approved. These cases cite and rely upon the case of *Robinson v. Drummond*, 24 Ala. 174, wherein a similar charge was approved. It must be observed, however, that the court

[Webb v. Gray.]

justified said charge in said *Robinson Case* upon the theory that the facts shown to justify the slander could not be shown under the general issue in mitigation of the damages. Says the court, speaking through Chilton, C. J.: "If the evidence in support of the justification only goes part of the way, and fails to make it good, it is disregarded, as it is unjust to allow a defendant to obtain any advantage by offering to prove more than he can, and this, too, by proof which could only be introduced under his false plea, and would have been rejected under the general issue." It may be that section 3746 was in the Code of 1852, and that the case of *Robinson v. Drummond*, *supra*, was decided after the adoption of the Code of 1852; but it is manifest that said section was overlooked, if in force, as the opinion expressly proceeds upon the idea that the evidence offered in support of the plea of justification was not admissible under the general issue in mitigation of damages. The cases of *Hereford v. Combs*, 126 Ala. 369, 28 South. 582, and *Pool v. Devers*, 30 Ala. 672, are expressly overruled, in so far as they approve charges similar to the one in question.

The trial court gave the defendant considerable latitude in proving statements to him, not only by Jim Lockridge, but by others, as to the relationship and intercourse between the said Lockridge and the plaintiff, and whether the court did or did not err in this report matters not, as said ruling was in favor of the appellant.

The court did not err, however, in declining to let the defendant prove the statements made by Lockridge to third persons as to his intercourse with the plaintiff, or his acts and conduct generally in leaving the community, or the reasons he may have given for doing so. This was hearsay evidence and was in no way binding

[Webb v. Gray.]

upon the plaintiff, as the statements were not made in her presence and were not part of the *res gestæ*. While the statute authorizes the circumstances under which the words were spoken or written to be given in evidence, under the general issue, in mitigation of damages, it does not have the effect of abrogating the rule of evidence applicable in other cases. "The rules governing the admissibility of evidence generally are applicable to actions of libel and slander. Thus the evidence must be relevant, and must not come within the prohibition of the hearsay rule."—25 Cyc. 492. "It is held that the defendant cannot offer in evidence communications of the same or similar defamatory matter by third persons, or recovery or pendency of suit therefor, as tending to show that whatever injury plaintiff had sustained to his reputation was not caused by defendant alone, or that he had received from others an amount which would go to compensate him for his injuries."—25 Cyc. 506; Newell on Def., etc., p. 899, § 76. As we read the case of *Fuller v. Deason*, 31 Ala. 654, it is in conformity with and not opposed to the foregoing rule. It seems that evidence is admissible as to plaintiff's general reputation with reference to the matter charged in the defamation, or his general reputation as a man of moral worth, without restriction to the particular feature in respect to which his character had been assailed. But the evidence must relate to the character or reputation of the plaintiff as fixed before the publication of the words complained of.—25 Cyc. 418.

In an action of slander, the general bad character of plaintiff may be given in evidence, under the general issue, in mitigation of damages, notwithstanding the defendant may also have interposed the plea of justification.—*Pope v. Welsh*, 18 Ala. 631. This rejected evidence of the defendant, however, as to the sayings,

[Webb v. Gray.]

acts, and conduct of Jim Lockridge, was not the proper way of proving the plaintiff's general character or the truth of the words constituting the slander, or that the defendant believed them to be true, unless the statements were made to him or he had knowledge of the acts and conduct of Lockridge when he uttered the words constituting the slander.

In discussing the rule of evidence in mitigation of damages when malice or a want of probable cause is involved, Mr. Elliott, in his work on Evidence (volume 3, par. 2458), says: "There are various matters which it is said may be proven in mitigation of damages. We do not understand this expression to mean that any of the matters ought to, or can, deprive plaintiff of his right to recover such damages as he has actually suffered, but rather that they may wholly or presently remove the presumption of malice which will thereby be indulged, and will therefore relieve the defendant from the imposing of punitive damages. It has been held that a defendant may prove in mitigation of damages that he received letters purporting to have been written by reputable persons, charging the plaintiff with certain wrongful acts; that these letters were in fact forgeries; and that he, believing them to be genuine, was imposed upon and induced to publish the libel complained of, in the belief that it was true." Mr. Elliott takes the position that where the element of good faith is involved, and the defendant is attempting to show his good faith, he may do so by proving the statement to him of third persons, and that this evidence is not hearsay, but is original evidence; and he very clearly announces the rule out of which the distinction grows. Where the question is not whether the statements are true, but whether they were made by a certain person, the man to whom they were made may testify that they

[Webb v. Gray.]

were made, and the evidence is original evidence for the reason that he is as competent to testify as to what was said as the man is who made the statements. If the truth or falsity of the words is involved, and that is an issue before the court, the man who heard the remarks, of course, could not testify as to their truth or falsity, because he has no knowledge thereof. Only the man who made the statements may testify in such cases without violating the hearsay rule, unless, of course, the statements are in the nature of admission by a party to the cause.—Elliott on Evidence, §§ 322-324. In order, therefore, to introduce the letters purporting to be from the plaintiff to Jim Lockridge, as admissions by her and in support of the truth of the alleged slander, the proof should connect the plaintiff with the same other than by the mere hearsay evidence of Lockridge, or of the fact that they were in a lady's handwriting, purported to be signed in her first name, and were handed to said Lockridge by the plaintiff's nephew, who lived in the same house with her; but, as an element of good faith on the part of the defendant was involved, he had the right to show that the letters were shown him by Lockridge and to prove the contents and circumstances connected with the exhibition of same to him, not as proof of the charge or in mitigation of actual damages, but as a circumstance to negative malice and to show that he had good reason to believe the statements he made, both when making them and when reiterating them by his plea of justification, and which could be considered in mitigation of punitive damages. For this purpose they were original, as distinguished from secondary or hearsay, evidence. The defendant in offering this evidence limited it to the extent of showing good faith and in mitigation of damages.

[Webb v. Gray.]

The plaintiff also laid a sufficient predicate to prove the contents of the letters, as Jim Lockridge, who was last seen with them, was out of the state.

The defendant also had the right to show by the witness Posey the contents of the letter, which he claims was delivered to Lockridge by the plaintiff's nephew in the store of and in the presence of the defendant, as this was corroborative of the defendant's improperly rejected evidence that Lockridge received and showed him the letter.

The trial court, however, did not err in excluding what transpired between Posey and Jim Lockridge after they left the defendant and went to see Dr. Vansant, or in excluding what transpired between the said Lockridge and Dr. Vansant as to the medicine.

The evidence as to the business relations between the defendant and the Lockridges, and what transpired as to purchasing the Lockridge interest by the defendant, was admissible to show that defendant had a motive for getting rid of Jim and that the report was maliciously started. This evidence may be weak, but its probative force was for the jury.

There was no error in so much of the oral charge as is insisted upon in brief of appellant's counsel, and which is based upon assignment of error number 30. Nor in the refusal of defendant's requested charge 7. Charge 6 was manifestly bad.

It was a question for the jury to determine whether or not the plaintiff was entitled to recover punitive damages, and the trial court did not, therefore, err in refusing defendant's requested charge 12.

There was no error in refusing charges 14, 16, and 17, requested by the defendant.

The amendment of the complaint by adding counts 5 and 6 was permissible.—Section 5367 of the Code of 1907.

[Ebersole v. Fields.]

The judgment of the city court is reversed, and the cause is remanded.

Reversed and remanded. All the Justices concur, except DOWDELL, C. J., not sitting.

Ebersole v. Fields.

Slander of Title.

(Decided April 17, 1913. 62 South. 73.)

1. *Libel and Slander; of Title; Pleading.*—In an action of slander of title the rules of pleading and evidence are enforced with peculiar strictness.

2. *Same; Right of Action.*—Special damages is the gist of the action of slander of title, and false and malicious statements disparaging title are actionable, when followed by special damages to the owner as a natural and proximate result of the statement.

3. *Same; Nature of the Special Damages.*—Mental distress is not part of the special damages necessary to support an action of slander of title; such special damage must be a pecuniary loss which is the proximate result of the slander.

4. *Same; Pleading; Sufficiency.*—Mere general allegations of loss are not sufficient to support an action of slander of title, an averment of special damages being necessary; hence, the complainant averring that defendant falsely slandered plaintiff's title, followed by allegations of mental distress and mere general allegations of monetary loss is not sufficient.

5. *Same; Statute.*—Section 2459, Code 1907, is merely declarative of the common law, and does not avoid the necessity of alleging special pecuniary damages.

APPEAL from Birmingham City Court.

Heard before Hon. C. W. FERGUSON.

Action by C. D. Ebersole against A. E. Fields for slander of title. Judgment for defendant on demurrer, and plaintiff appeals. Affirmed.

The first count declares the plaintiff to be the owner of a fee-simple estate in the lands hereinafter described, subject to a mortgage, and claims \$5,000 damages for

[Ebersole v. Fields.]

falsely and maliciously impugning plaintiff's title to said property, in publishing of or concerning said property in a paper, to wit, a letter published at Birmingham by the defendant, with the intent to defame plaintiff's title, which words were substantially as follows: [Here follows letter addressed to Alabama Home Building & Loan Association, stating that Capt. A. E. Fields, a client of the writer, had listed for sale an undivided half interest in lots 2 to 7, inclusive, block 155, East Lake, and that the records showed that on December 30, 1910, C. D. Ebersole had executed a mortgage on this property to the association, and stating that they would be glad to take the matter up with them for the purpose of selling them their interest in the property. The letter is signed by the Carter Realty Company, by W. F. Carter.] And it is alleged that as the proximate consequence of said libel plaintiff was greatly worried, vexed, harassed, and bothered, and was put to great trouble, inconvenience, and expense in and about his attempts to quiet his title to the property, and to prevent the libel from doing further harm to plaintiff, and plaintiff claims punitive damages. The second count is the same as the first, except that the letter is addressed to the plaintiff himself. The other counts are based on the false and malicious claim of the defendant to a one-half undivided interest in said property, and claiming punitive damages.

HARSH, BEDDOW & FITTS, for appellant. The damages claimed were sufficiently stated, and the court was in error in sustaining demurrers to the complaint.—Sec. 2459, Code 1907; 44 N. W. 291; 68 S. W. 577.

ALLEN & BELL, for appellee. It is essential that damages of a pecuniary nature be distinctly and particu-

[Ebersole v. Fields.]

larly set out as mental distress is not an element of special damages, and general averments of loss is not sufficient.—*Hill v. Ward*, 13 Ala. 310; *Ivey v. Pioneer Co.*, 113 Ala. 349; *Lewis v. Paull*, 42 Ala. 136; 13 Enc. P. & P. 97; 13 L. R. A. 707; 90 Cal. 537; 59 Cush. 104; 25 Cyc. 454. Sec. 2459 is merely declaratory of the common law, and does not relieve a plaintiff from alleging and proving special pecuniary loss.—*Smith v. Gafford*, 33 Ala. 172; *Gunley v. Humphries*, 35 Ala. 626, and authorities supra.

MCCLELLAN, J.—Action for “slander of title to real estate.”

Referring to our early case of *Hill v. Ward*, 13 Ala. 310, it was said in *Griffin v. Isbell*, 17 Ala. 186: “The action of slander, in all its varieties, is one of peculiar strictness in respect of the pleadings and the evidence. There is, perhaps, no other civil action which has been treated so strictly by the courts.”

In *Hill v. Ward* the action was grounded upon declarations and conduct whereby a sale of personal property at auction was alleged to have been wrongfully interfered with. In the course of that opinion it was said: “Conceding that a party is liable for any false and malicious words spoken to the prejudice of another, *if special damages ensue*, the allegations contained in these counts, in our opinion, do not bring them within the rule.” Italics supplied.

We have set out in this quotation from *Hill v. Ward*, for that it imports a recognition—though by the way, as to the point particularly ruled upon—the idea that special damages, naturally, proximately, resulting, is the gist and heart of the action of “slander of title to property.”

[Ebersole v. Fields.]

At page 558, 25 Cyc., this is the statement of the rule: "False and malicious statements, disparaging property or the title thereto, when followed, as a natural, reasonable, and proximate result, by special damage to the owner, are actionable." In the same work, at page 564, it is stated that a complaint which fails to allege special damages "fails to allege a cause of action." A number of adjudications in other jurisdictions supporting the statement of the text are cited in the note.

The Supreme Court of Minnesota, in *Wilson v. Du Bois*, 35 Minn. 472, 29 N. W. 69, 59 Am. Rep. 336, has thus pronounced: "The action is in the nature of one for slander of title; * * * and hence it is not the ordinary action for slander, properly so called, 'but an action on the case for special damages sustained by reason of the speaking' complained of. [Citing a number of apt authorities.] Special damages are therefore of the gist of the action.—*Wetherell v. Clerkson*, 12 Md. 597. Without them the action cannot be maintained; and therefore a complaint failing to allege them fails to allege a cause of action." See volume 20, Notes to Am. Rep. 981, for note to this case. The following authorities are to the same effect: *Burkett v. Griffith*, 90 Cal. 532, 27 Pacfl 527, 13 L. R. A. 707, 25 Am. St. Rep. 151, with satisfactory note on pages 707, 708, collating additional decisions on the subject; *Swan v. Tappan*, 5 Cush. (Mass.) 104, 109, 110; 13 Ency. Pl. & Pr. pp. 97, 98, and notes.

The text last cited is this: "Averment of special damage is necessary. An allegation of loss in general terms is not sufficient. As words spoken of property are not in themselves actionable, it is necessary to allege the facts which show wherein the plaintiff has sustained damage; and, as special damage is the only ground upon which the action can be maintained. it is essential that

[Ebersole v. Fields.]

such damage be distinctly and particularly set out." To like effect is Judge Freeman's notes in 87 Am. Dec. 562, 563, and in 25 Am. St. Rep. 158, 159.

The nature and essential effect of the special damage suffered, if the action is maintainable, is that the false and malicious matter charged interrupted, or injuriously affected, some dealing of the plaintiff with his property, or naturally, reasonably, and proximately superinduced the necessity for his pecuniary expenditure to relieve his right to the property from the damaging effect of such false and malicious slander.—*Burkett v. Griffith, supra*; *Wilson v. Du Bois, supra*; *Chesebro v. Powers*, 78 Mich. 472, 44 N. W. 290; 25 Cyc. pp. 563, 564, and notes.

Mental perturbation suffered, in however immediate consequences of such false and malicious slander, is not within the range of the special damage naturally, reasonably, and proximately resulting from slander of the title to property; and in an action of this character consequential mental distress is not an element of recoverable special damages. In this connection the following statement by Judge Freeman (*Gent v. Lynch*, 23 Md. 58, 87 Am. Dec. 562) appears particularly apt and well supported by authority: "To maintain the action, the words must not only be false, but they must be uttered maliciously, *and be followed* as a natural and legal consequence by a *pecuniary damage* to the plaintiff, which must be specially alleged in the declaration and substantially proved at the trial."

The Supreme Court, in *Pollard v. Lyon*, 91 U. S. 237, 23 L. Ed. 308, pronounced to the same general effect with respect to *special damage*. And in this jurisdiction the court, in the analogous (as to count 3) case of *Ivey v. Pioneer Savings & Loan Co.*, 113 Ala. 359, 21 South. 531, illustrated the same principle. To like

[Ebersole v. Fields.]

effect, in principle, are our cases of *Lewis v. Paull*, 42 Ala. 136, 138, 139, and *Dothard v. Sheid*, 69 Ala. 135, 139.

Measured by the rule stated, it is evident that neither the original complaint, nor that pleading after amendment, sufficiently set forth any recoverable special damage suffered by plaintiff in consequence of the averred false and malicious slander of his title to the property particularly described. What averments are made from which a *possible* conclusion of pecuniary loss may be drawn are most general, far from being distinct and particular.

The case, from the Court of Appeals of Missouri (St. Louis), of *Butts v. Long*, 94 Mo. App. 687, 68 S. W. 754, is not in accord with the weight of, and best considered, authority on the question of necessity to particularly aver the basis and circumstances upon which the claim of special damages is rested. In *Cheseboro v. Powers*, *supra*, the court does not appear to have undertaken, if indeed it was invited, to rule upon the sufficiency of the initial pleading. It seems, however, that there the essential facts to support a claim of special damage were particularly averred.

It is urged that Code, § 2459, operates to avert the application of the strict common law rules to which reference has been made. That section reads: "The owner of any estate in lands may maintain an action for libelous or slanderous words falsely and maliciously impugning his title." That section created no new or different cause of action. It is but a general reaffirmation of a general right recognized, as appears from the authorities ante, at common law. That statute has not effected, and it was not so intended, any change in the rules of pleading applicable to the character of action to which its general affirmation of right relates.

[McLaughlin v. Beyer.]

The demurrers were properly sustained. The judgment is affirmed.

Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

McLaughlin v. Beyer.

(Three Cases.)

Libel and Slander.

(Decided January 23, 1913. Rehearing denied February 14, 1913. 61 South. 62.)

1. *Judgment; Amendment; Time.*—The motion to correct a judgment and to set it aside must be made within the time during which the trial court has control of the judgment, unless it is a motion for a judgment nunc pro tunc which may be made at any time; in this case, the motion not having been made to correct the judgment and to set it aside within thirty days as required by the Local Statutes, and until after the term of the court had expired, both motions were properly denied.

2. *Appeal and Error; Effect of Appeal on Judgment of Lower Court.*—Where a party has perfected an appeal and has superseded the execution of a judgment in the trial court, the trial court loses all jurisdiction and control over said judgment and cannot after that time either correct the judgment or set it aside.

3. *Same; Record; Questions Presented.*—This court will not review on appeal the summons and complaint issued in a previous suit where it is not made to appear how such summons and complaint could be used to contradict the testimony of the plaintiff as a witness, for which purpose alone it was offered.

4. *Abatement and Revival; Another Action Pending; Dismissal.*—The fact that an action had been dismissed is a complete answer to a plea in abatement on the ground of the pendency of such other action.

5. *Same; Evidence.*—A plea in abatement of the pendency of another action, is not good unless the parties are the same, and where the parties are different the duty is on the pleader to show the identity of the parties.

6. *Judgment; Res Judicata; Final Judgment.*—Where the minute entry of the judgment showed that the judge intended to enter a final judgment on the merits, as the statute gave him the right to do, but the judgment itself was simply one of dismissal for plaintiff's failure to answer interrogatories, and taxing the cost against plaintiff, there was no final judgment which could be pleaded as res judicata, since to support a plea of res judicata, a judgment must be final and on the merits.

[McLaughlin v. Beyer.]

7. Limitation of Action; Infancy; Dereliction of Next Friend.—Where an infant brings an action by next friend and the action is dismissed for failure to answer interrogatories, the infant is not barred by the statute of limitations of one year on account of such dereliction on the part of such next friend, as section 4846, Code 1907, allows an infant three years after reaching majority within which to bring an action.

8. Trial; Objections to Testimony; Motion to Exclude.—Where no objection was made to a question to which there was a responsive answer, the court will not grant the other party a motion to exclude it.

9. Witnesses; Contradictions; Interrogatories in Another Suit.—Where a defendant failed to comply with an offer of the court to permit in evidence the answer to one of the interrogatories propounded to an infant plaintiff, if he would show that it was signed by plaintiff, and contradicted her present testimony, the court could properly exclude the interrogatories offered by defendant and taken in another suit for the purpose of contradicting plaintiff.

10. Charge of Court; Mistrial.—Since a mistrial might be the result of such a situation, a charge asserting that the verdict should be for the defendant if any juror did not believe plaintiff's evidence to be reasonable, was properly refused.

11. Same; Argumentative.—A charge that an accusation of slander is easy to be brought and hard to defend, though the defendant be innocent, was properly refused as argumentative.

12. Same; Misleading.—A charge that witnesses are separated so as to ascertain whether the facts as related by the witnesses are true, and if the jury believe their statements are materially variant, they are authorized to reject all of such evidence, was misleading if not positively erroneous.

13. Same; Misleading and Argumentative.—A charge asserting that each party is entitled to the independent judgment of each juror, and unless all of the jury are reasonably satisfied of the truthfulness of the witnesses for plaintiff, they must find for defendant, is misleading and argumentative.

14. Same; Effect of Evidence.—The court is not required to instruct the jury that there is or is not any evidence of a particular fact.

APPEAL from Birmingham City Court.

Heard before Hon. WILLIAM M. WALKER.

Action by Rosa Beyer, by her next friend, against Lizzie N. McLaughlin. Judgment for plaintiff, and defendant appeals from the judgment, and also from orders refusing to amend and to set aside the judgment. Affirmed.

See, also, 58 South. 1037.

[McLaughlin v. Beyer.]

The plea in abatement is as follows: "Comes defendant in the above-entitled cause, and for plea in abatement of the said complaint sets down and says: That at the time of the suing out of such complaint herein, and of the commencement of this action against the defendant, there was pending against this defendant a former suit by substantially the same party for substantially the same cause of action, that is to say, at the said time, there was pending in the city court of Birmingham in Jefferson county, state of Alabama, cause No. 26,217 of Clara Beyer et al. against this defendant, action for libel and slander, as therein set out, as by the record thereof remaining in the said court appears, which said suit is between substantially the same parties and for substantially the same cause of action as therein shown, and is still pending and undetermined therein, and this the defendant is ready to verify." Motion to dismiss was made on the grounds set out in the plea above, for the reason that it is shown that on January 16, 1912, the cause set out in said plea was dismissed out of this court, and plaintiff has not paid the costs of said former suit. Another plea in abatement was filed setting up the same state of facts as set out in the plea above, but substituting for Clara Beyer, Rosa Beyer, by next friend, and for the number 26,217, the number 23,617, and alleging additionally that said suit was heard on January 24, 1912, and determined in favor of this defendant by the city court wherein it was tried. The exhibits show that, on motion to dismiss, the court entered a judgment of dismissal because of the failure of the plaintiff to answer interrogatories filed by the defendant. The defendant demurred for the reasons noted in the opinion.

The following charges were refused to the defendant: (13) "The court charges the jury that, in considering the weight of the evidence in this case, they may look at

[McLaughlin v. Beyer.]

the character of the evidence, and the reasonableness of it taken in connection with the surrounding facts in the testimony before them, and, if any of the jury does not believe the evidence in behalf of the plaintiff to be reasonable, they must find their verdict for the defendant."

(15) "The court charges the jury that an accusation of slander is easy to be brought and hard to be defended against, though the defendant be ever so innocent." (16)

"The court charges the jury that the object of the law in separating witnesses so that they cannot hear each other testify is to ascertain whether or not the facts as related by the witnesses are true, and, if the jury believe that the statements of the witnesses are materially variant from each other, then they are authorized to reject all of such evidence in making up their finding." (17)

"The court charges the jury that each of the parties to this cause is entitled to the independent judgment of each of the jurors as to the fact and truthfulness of the facts in evidence before them, and unless all of the jury are reasonably satisfied of the truthfulness of the witnesses for the plaintiff, as to proving the allegations of the complaint, they must find their verdict for the defendant." (20) "The court charges the jury that there is no evidence before them as to the special damages claimed by the defendant in her complaint, and that as to such they must find their verdict for the defendant."

(22) "The court charges the jury that when the plaintiff alleges such damages she assumes the burden of proving such damages, and that she has not proved to the jury any special damages in this case, and that they must find for the defendant as to any special damages claimed by plaintiff."

STERLING A. WOOD, and CLEMENT R. WOOD, for appellant. The plea in abatement was proper, and the court

[McLaughlin v. Beyer.]

was in error in its actions thereon.—Sec. 5330, Code 1907; 1 Enc. P. & P. 31; 21 N. Y. 399; *Karthus v. N. C. & St. L.*, 140 Ala. 433; *Liverpool I. Co. v. Tillis*, 110 Ala. 201; *Eagle I. Co. v. Malone*, 149 Ala. 436; *Eagle I. Co. v. Baugh*, 147 Ala. 613. Under these authorities, the judge erred in passing upon the facts raised by such plea, and should have submitted that issue to the jury to be determined prior to the trial on the merits.—*S. S. S. & I. Co. v. Milbra*, 55 South. 890; *Gravett v. Allen G. Co.*, 56 South. 17. The statute of limitation applies since the infant had already begun suit which had been dismissed.—18 Ala. 338; 38 Ala. 310; 81 Ala. 238; 84 Ala. 563; 132 Ala. 64; 85 Ala. 169; 127 Ala. 577; Secs. 4840 and 2476, Code 1907. The plea of *res judicata* was good, and the court erred in not so holding; as a dismissal for want of prosecution, or for failure to answer interrogatories is a dismissal on the merits.—122 Ala. 555; 128 Ala. 483; 147 Ala. 425; 9 Enc. P. & P. 614; 127 Ala. 260; 17 U. S. 317; 7 Wall. 107.

HARSH, BEDDOW & FITTS, and W. W. WHITTAKER, for appellee. Many reasons prevented the granting of the motion to correct the judgment and to set it aside, first, because the motion was not made within thirty days after judgment; next, it was not made until after the term of the court had expired, and lastly, an appeal had been perfected and the execution of the judgment superseded.—*Schwartz v. Oppenheimer*, 90 Ala. 463; *Bridges v. T. C. & I.*, 57 South. 883. The attempt here is not to amend *nunc pro tunc*.—103 Ala. 197; 72 Ala. 22. The question of the statute of limitations cannot enter as it appears that the present plaintiff was not 21 years old when this suit was brought, and hence, she is protected by section 4846, Code 1907.—*Collins v. Gillespie*, 148 Ala. 558; 97 Am. St. Rep. 993; 53 N. W. 1053; 25 Cyc. 1264; *Lee v.*

[McLaughlin v. Beyer.]

Wood, 85 Ala. 169. There is nothing in the plea of *res judicata*.—2 S. & P. 322; *Wise v. Faulkner*, 45 Ala. 471; *Beadle v. Graham*, 66 Ala. 99; 109 U. S. 121; 49 Am. Dec. 119; 14 Cyc. 454; 23 Cyc. 1131; 4 Wall. 237; 8 South. 1; *McCall v. Jones*, 72 Ala. 371; *Perkins v. Moore*, 16 Ala. 9. The court properly disposed of the pleas in abatement.—*Pruitt v. Williams*, 156 Ala. 352; *Couch v. Davidson*, 109 Ala. 321; *Anniston Co. v. So. Ry. Co.*, 145 Ala. 351; *Pearce v. Clemmons*, 73 Ala. 256; 40 Am. St. Rep. 57. The parties are not the same, and it is on defendant to establish identity of parties.—*Foster v. Napier*, 73 Ala. 604; 112 Ala. 654; 26 Ala. 720.

MAYFIELD, J.—These three causes by agreement are submitted as one cause. Appeals Nos. 529 and 530 are supplemental to appeal No. 531. No. 529 is an appeal from an order declining to amend a judgment by striking out a phrase thereof, “is not well taken in law and.” No. 530 is an appeal from an order or judgment declining to set aside the judgment in the main case on the ground that the judge trying the case was related to the attorney for plaintiff within the prohibited degree.

We do not think there is any reversible error as to either of the two subsidiary appeals.

No motion was made in the lower court to correct the judgment or to set it aside, until long after the 30 days during which the trial court, under the local statute, had control over the judgment, had expired. This alone would have prevented the trial court from granting either of the motions. Not only this, but the term of the court had expired, which would have prevented the court from granting either motion under the general statutes. They were not motions to amend the judgment *nunc pro tunc*—which the court can do at any time and without notice to the opposite party.

[McLaughlin v. Beyer.]

Moreover, the motions were not made until after the movant had perfected an appeal to this court, and had superseded the execution of the judgment which she had sought to have set aside. Thus, appellant, by her own act, had removed the case wholly and absolutely from the trial court into this court. The effect of this appeal was to cause the trial court to lose all jurisdiction and control of the case pending the appeal to this court. The inferior court must, in such a case, of necessity, yield to the superior jurisdiction. The case cannot be pending in both courts at the same time. The loss of jurisdiction in the lower court is so complete as to require either party who seeks relief from any error, except a few, not necessary here to mention—to apply to the higher court. This is clearly but just and right so far as the appellant is concerned. She, having taken her appeal to this court, ought not to be allowed to still proceed in the lower court, and, so, pursue two remedies at the same time. The following authorities are conclusive on this subject: Elliott on Appellate Procedure, 541 et seq.; *Allen v. Allen*, 80 Ala. 154; *Boynton v. Foster*, 7 Metc. (Mass.) 415; *Ensminger v. Powers*, 108 U. S. 292, 2 Sup. Ct. 643, 27 L. Ed. 732; *Mitchel v. United States*, 9 Pet. (U. S.) 711, 9 L. Ed. 283; *Keyser v. Farr*, 105 U. S. 265, 26 L. Ed. 1025; *Coates Bros. v. Wilkes*, 94 N. C. 174; *Stewart v. Stringer*, 41 Mo. 400, 97 Am. Dec. 278.

We do not think there was any reversible error in the rulings or judgments of the trial court as to the plea of abatement, of pending suit, or as to the plea in bar, of *res judicata*.

As to the first, it is sufficient to say that no evidence was offered in support of the plea to carry the question to the jury. The plea set up matter of record, and the proof offered in its support neither showed nor

[McLaughlin v. Beyer.]

tended to show a pending suit between the same parties, as to the same cause of action, as alleged in the plea. One record, that as to the action between the same parties, showed that the case was not pending when the plea was filed, nor at the time of the trial, but had been dismissed and was not then a pending action between the parties, as alleged. As to the other record, it is sufficient to say that this record was not of any action between the parties to the action in which the plea was interposed, but was an action against the defendant, brought by another and different party, to-wit, Clara Beyer; and no evidence was offered to show that Clara Beyer and this plaintiff, Rosa Beyer, were one and the same person suing in different names. So there was no sufficient evidence to carry this question to the jury, and hence the court did the correct thing to enter a judgment for the plaintiff on this plea of abatement.

As to the plea in bar of *res judicata*, we think it was insufficient, and that the demurrer was properly sustained thereto. The plea did not set up a final judgment on the merits, or one tantamount thereto in effect. It may be that the trial court could have entered, and intended to enter, a final judgment against this plaintiff, in the former suit between these parties; but the record fails to show such judgment and at best shows only one of dismissal for failure to answer interrogatories.

Judging from expressions and phrases used in the statute and in the judgment entry, the trial court was of the opinion that judgment final against the plaintiff, or in favor of the defendant, could and ought to be entered, for the failure of plaintiff to answer the interrogatories; but the record fails to show that the court entered such judgment, but only dismissed the pending action and awarded judgment against the plaintiff and in favor of the defendant for the costs of that suit.

[McLaughlin v. Beyer.]

We do not think that the language used in this judgment entry in question is efficacious to make the judgment entry a final one on the merits, or one which would or should have been rendered if there had been a trial on the merits, and the plaintiff had offered no evidence. While the judgment entry does recite so much of the statute, and refers to it as the authority, it does not constitute a final judgment, but, instead thereof, after reciting this part of the statute, proceeds to formulate a judgment of dismissal only.

If the statute in question had provided that judgment of *nonsuit* or of dismissal, in such cases, should have the force and effect of a final judgment on the merits, the question would be different; but the statute does not so provide, as does rule 28 of chancery practice, Code, vol. 2, p. 1537. It only authorizes the court to enter up the different kinds of judgments specified in the statute, as the merits of the particular case in the judgment of the court warrant.

The court could have taxed the plaintiff with a part only, or with all of the costs, and have entered judgment accordingly; but this it did not do, but entered a judgment of dismissal.

The court could, under the statute in question, have entered such judgment as would have been appropriate if there had been a trial on the merits and the plaintiff had offered no evidence. This, however, the court did not do, but, after reciting this part of the statute, proceeded to enter up a judgment of dismissal, which we do not think is a final judgment or one that can be availing to support a plea of *res judicata*.

Courts cannot look to recitals in minute entries to change a judgment of dismissal to one final, or one such as would be appropriate if no evidence was offered. Recitals in minute entries, such as those found in the entry

[McLaughlin v. Beyer.]

in question, may be likened, in some respects, though not in all, to docket entries made by the trial judge, which are, as has been frequently said by this court, "merely docket memoranda of the presiding judge, intended, and operating, only as directions to the clerk as to what judgment should be entered on the records of the court," etc. —*Morgan v. Fleæner*, 105 Ala. 356, 16 South. 716; *Brightman v. Meriwether*, 121 Ala. 602, 25 South. 994; *Baker v. Swift & Son*, 87 Ala. 530, 6 South. 153; *Wynn v. McCraney*, 156 Ala. 633, 634, 46 South. 854.

As before stated, in this case the trouble is that the judgment was not entered up which the recitals seem to indicate was intended to be entered, but a different judgment—one of dismissal.

It is so well settled that a judgment, to support a plea of *res judicata*, must be final and must be rendered on the merits, and must not be merely a judgment of nonsuit or dismissal, that we deem it unnecessary to cite the authorities in support of the proposition. Sometimes a statute or a rule of practice provides that judgments of this character, such as judgments of dismissal, or two nonsuits, shall have the force and effect of a judgment final on the merits; but it requires such express statute or rule to make such judgments availing as *res judicata*.

As we have shown, the statute in question does not so provide. It authorizes the rendition of a judgment final; but, as we have shown, no such judgment was rendered, but only one of dismissal.

This court has been very much divided on the effect of judgments discharging garnishees on failure to contest their answers, which line of cases is relied upon by counsel for appellant; but that question is not raised on this appeal.

The question presented to us is not, what judgment ought to have, or could have been entered, but what judgment was in law entered.

[McLaughlin v. Beyer.]

We do not think the plea of the statute of limitations of one year was availing as a defense to this action. The plaintiff was clearly within the protection of section 4846 of the Code, which allows infants three years after becoming of age, as the period by law for the bringing of the action. The record shows that she was yet an infant when this action was brought. We do not think that she was barred by the act of her next friend in instituting a former suit within the period, which he allowed to be dismissed on account of his failure to answer interrogatories propounded to the plaintiff. The neglect or dereliction of a next friend, in the prosecution of a suit or in allowing a dismissal thereof, ought not to be allowed to prejudice the rights or remedies of the infant, and such seems to be the weight of the authority on the subject.—*Collins v. Gillespy*, 148 Ala. 558, 41 South. 930, 121 Am. St. Rep. 81; 25 Cyc. 1264; *Tucker v. Wilson*, 68 Miss. 693, 9 South. 898. He has no power or authority to settle or compromise the suit, and, if he cannot do this, surely his allowing the suit to be dismissed ought not to bar his right of action which he otherwise would have had.—*Isaacs v. Boyd*, 5 Port. 388; *Edsall v. Vandemark*, 39 Barb. (N. Y.) 589.

In the case of *Tucker v. Wilson*, *supra*, it is in effect said that a suit by minors, by next friend, is not abated by the death of the next friend, and that suits brought by such minors, which were dismissed, did not bar another action brought by them as to the same subject-matter.

We can see no error in the court's ruling in declining to exclude the answer of plaintiff, as a witness, to questions propounded to her by her attorney, on the trial. No objection was interposed to the question, and the answer was responsive and, so far as we can see, was pertinent to the inquiry; and, if not, the defendant cannot be al-

[McLaughlin v. Beyer.]

lowed to speculate as to what the answer will be and, if unfavorable, then move to exclude it.

It is not made to appear how the summons and complaint in another suit by plaintiff could be used to contradict the plaintiff as a witness on this trial, and this is the only purpose for which it was offered. As to the answer of plaintiff to interrogatories propounded to her in that suit, which were offered for the same purpose, the court offered to allow the answer to one of the interrogatories to be introduced if counsel would show that the answer was signed by plaintiff, and that it differed from her statement as a witness on the stand on this trial. This offer not being complied with, we do not think the trial court erred in declining to allow the answers to be introduced in evidence.

Charge 13 was properly refused. It requested a verdict for defendant if any juror did not believe plaintiff's evidence to be reasonable. A mistrial might be the result of such belief on the part of any one of the jurors.

Charge 15 was a mere argument. Charge 16 possessed misleading tendencies, if it was not otherwise bad. Charge 17 was argumentative, and possessed misleading tendencies.

Charges 20 and 22 were properly refused.

We cannot agree with counsel for defendant that there was no evidence of special damages in this case. This was certainly a question for the jury. Moreover, we have repeatedly ruled that a court is not required to charge the jury that there is no evidence of a given fact.

Finding no reversible errors, the judgment must be affirmed.

Affirmed.

DOWDELL, C. J., and ANDERSON and DE GRAFFENRIED, JJ., concur.

[Parsons v. Age-Herald Pub. Co.]

Parsons v. Age-Herald Pub. Co.

Libel and Slander.

(Decided February 6, 1913. 61 South. 345.)

1. *Libel and Slander; Privileged Communication; Judicial Proceedings.*—A fair and accurate newspaper report of judicial proceedings, published in good faith and not to injure the persons concerned, is privileged, although it contains matter that is false, defamatory and injurious.

2. *Same.*—Newspapers have no particular privilege with reference to the publication of libel, but are liable as ordinary persons.

3. *Same.*—While newspapers may discuss and criticize without liability the conduct and motives of public officers, if their comments are fair and reasonable, they are liable for false aspersions on the character of such officer, and can justify only by proving the truth of the statements.

4. *Same.*—Publication of pleading or other preliminary papers in an action or proceeding, to which the attention of no judicial officer has been called, and on which no judicial action has been invoked, is not within the privilege accorded at common law to the publication of judicial proceedings.

5. *Same.*—The report of a grand jury concerning the alleged official misconduct of a constable, was not a judicial proceeding within the rule of qualified privileges in the law of libel at common law, where such report was not found to establish an impeachable offense.

6. *Same.*—A fair statement in a newspaper of the contents of the grand jury reports charging an official with certain improper acts not sufficient to constitute an impeachable offense, was qualifiedly privileged, if published in good faith, without malice, and in the belief that the matter was true, although the report was beyond the authority of the grand jury.

7. *Same.*—Libelous imputations in a grand jury report on private citizens or public officers, not touching their fitness for office, or their fidelity to the public service, or the propriety of their official acts, are not properly matters of public interest, and are not privileged.

8. *Same.*—Where a grand jury's report contains an attack on a public officer, but has not been duly published by the grand jury itself in open court, privilege does not attach to a publication thereof by a newspaper.

9. *Same.*—The publication of matters which are forbidden by law or by order of the court as being improper for publication, is not privileged when published by third persons.

10. *Same.*—Where matter is published from a grand jury's report after filing, without comment or criticism, it must be deemed as a matter of law, fair and accurate, in an action for libel.

[Parsons v. Age-Herald Pub. Co.]

11. *Same.*—The rule that fair comment and criticism on public officers is privileged, is limited to comment or criticism on admitted or proven facts or conduct, and does not extend to the expression of adverse criticism on new facts.

12. *Same.*—Whether comment or criticism on the conduct of a public officer was privileged, is a question of law, but conceding the occasion, whether the comment or criticism was fair, was a question for the jury.

13. *Same.*—A statement in a newspaper published with reference to a public officer that he "preys upon the poor and unfortunate" was libelous per se when wholly without foundation so far as shown.

14. *Same; Mitigation of Damages.*—Under the general issue in an action for damages, defendant may prove the truth or partial truth of any of the alleged defamatory matter in mitigation of damages.

15. *Same; Evidence.*—Where a newspaper charged a constable with proceeding improperly under a writ, the court papers in the action in which the writ was issued were admissible in an action for libel, to show the fact and character of the proceeding in connection with which plaintiff was charged with official impropriety.

16. *Same.*—A letter written by plaintiff to defendant concerning the publications complained of, and giving plaintiff's version of the transaction, was legal evidence both for and against him when offered by defendant.

17. *Grand Jury; Nature; Function.*—Although a grand jury is a constituent part of the court to which it is attached, it is also a distinct and partly independent body, and its functions are of a judicial nature, although ex parte.

18. *Same; Duty as to Public Officer.*—It is the duty of a grand jury to investigate any alleged misconduct or incompetency of a county officer, and if they find that he ought to be removed under section 7099, Code 1907, to report the same to the court which report must be entered on the minutes as prescribed by section 7124, Code 1907: if the jury fails to find an impeachable fault or offense, it is neither required nor authorized to report the result of its investigations.

19. *Evidence; Hearsay; Res Inter Alios Acta.*—Where a defendant newspaper published certain observations of "a citizen" concerning plaintiff, which were written by a witness for defendant who had no connection either with defendant or the newspaper, a question asked him on cross-examination if he had not told several persons that his article referred to plaintiff, was not only objectionable as hearsay, but as calling for matter *res inter alios acta*.

20. *Appeal and Error; Record; Matters Shown.*—Where the record fails to show the grounds on which a plea was demurred to, it will be presumed on appeal that the demurrers did not reach the defects in the pleas, where they were overruled by the trial court.

21. *Same; Harmless Error; Pleading.*—Where a replication to a plea of privilege alleged that defendant's comment was not reasonable or fair, and was not confined to fair comment on the alleged fact, and also set up additional facts, it was no more than a denial of one of the necessary averments of the plea, and plaintiff was not injured by the elimination of the replication, as a special reply.

[Parsons v. Age-Herald Pub. Co.]

APPEAL from Jefferson Circuit Court.

Heard before Hon. JOHN C. PUGH.

Action by W. M. Parsons against the Age-Herald Publishing Company for damages for libel and slander. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

The charges referred to are as follows: (1) Affirmative charge not to find for defendant on special plea 4. (2) Same as to special plea 5. (3) Same as to special plea 6. (4) "If you believe the evidence, you cannot find for defendant on its special plea 10."

GASTON & PETTUS, for appellant. The court erred in overruling demurrers to special plea 4, and in refusing to give the general charge as to this plea, and this raises the question whether the language complained of was privileged.—25 Cyc. 572; *Lawson v. Hicks*, 38 Ala. 286; *Phillips v. Bradshaw*, 167 Ala. 209. The grand jury was without authority to make or file the report as it found no impeachable offense under section 7099.—20 Cyc. 1334-5-7; sec. 7124, Code 1907; 25 Cyc. 350 and 408; 20 L. R. A. 533; 17 A. & E. Enc. of Law, 1277; 18 Ib., 942, 1042. The same is true of the 5th plea, the 6th and 7th pleas.—25 Cyc. 420, and authorities supra. The court was in error in admitting the papers in the case referred to, and in refusing the charges requested.—Authorities supra.

NATHAN L. MILLER, for appellant. The court properly overruled demurrers to the plea as each showed the publication of judicial proceedings with fair and reasonable comment, and the publication was at least qualifiedly or conditionally privileged and not actionable without proof of actual malice on the part of the publisher.—*Lawson v. Hicks*, 38 Ala. 279; 51 S. E. 756; 19

[Parsons v. Age-Herald Pub. Co.]

L. R. A. (N. S.) 862; 16 L. R. A. (N. S.) 953; 37 Super. Ct. 42; 13 N. W. 773; 27 Cyc. 407-8, and notes; Newell on Defamation, 544-549, 564-574. On these authorities the court was without error in sustaining demurrers to the replication. Papers in the case were properly admitted.—Secs. 5745-46, Code 1907. So also was the letter complained of. The testimony of the witness Clark was hearsay and *res inter alios acta*. The court properly refused the affirmative charge as to plea 4.—25 Cyc. 547. The evidence was sufficient to justify the inference that the publisher believed the statement published to be true.—*Sledge v. Scott*, 56 Ala. 202; *Brewer v. Watson*, 71 Ala. 299; *Baker v. Trotter*, 73 Ala. 277; *McCormick v. Joseph*, 77 Ala. 236.

SOMERVILLE, J.—The plaintiff, a constable of Jefferson county, sued the defendant, as publisher of a daily newspaper published in Birmingham, for the publication in its columns of certain alleged libels. Defense was made under pleas of the general issue and privilege, and there was verdict and judgment for the defendant.

Two questions of controlling importance are presented by the pleadings and evidence. The first and second counts of the complaint charge the false and malicious publication concerning plaintiff of the following matter: "In connection with official acts we feel called upon to give an expression of censure to one of our constables, M. W. Parsons, whom evidence shows has perverted the uses of his office, and made it a means of oppression, having at one and the same time acted as a constable, a clerk of the court and attorney, for each of which three services he received compensation. We do not feel that the evidence warranted an impeachment in this case, and we can therefore only express our deep condemnation for such acts."

[Parsons v. Age-Herald Pub. Co.]

The third count is based upon the following matter: " 'Many persons will approve that portion of the grand jury report which deals with reprehensible acts of constables and justices of the peace,' said a citizen who is familiar with some of the doings of this class of officers, 'I know of some very outrageous acts by some of these officers, and in some instances they should have been sued on their bonds. One young woman who had been humiliated and dragged into an inferior court should have sued the constable for his acts. And the more one of these razorback limbs of the law added insult to injury in an effort to cover the constable's bad break, I think there will be found a way to impeach this officer of the law who preys upon the poor and unfortunate. Any constable so discredited as to be declared by a grand jury so reprehensible as to barely escape impeachment should resign.' "

The fourth plea, interposed to the complaint as a whole, and to each count separately, avers that the matter complained of was a part of the official report of the grand jury for Jefferson county, made in writing to the criminal court of said county and reported thereto in open court by the foreman of said jury; that said matter was a part of a fair, accurate, and impartial report of the proceedings in said court on November 17, 1909; that said publication was not made by defendant for the purpose of injuring plaintiff, but was made in pursuance of its duty to give publicity to said official document, of which the public had a right to be informed; and that said publication was made bona fide, without malice, and in the belief that said matter was true.

The tenth plea, interposed to the third count only, avers that the publication complained of was a fair and reasonable comment by a reputable citizen of Birmingham concerning the conduct of public officers and public

[Parsons v. Age-Herald Pub. Co.]

offices; that as publisher of a newspaper it was defendant's duty to publish such comments made by itself or by reputable citizens; that this publication was made without malice or any intention to injure plaintiff, and in the belief that the matters alleged were true; and that they were published in the interest of the public and the proper administration of public affairs.

Demurrers impeaching the sufficiency of these pleas were overruled by the court.

It is a principle everywhere recognized that a fair and accurate report of "judicial proceedings," published in good faith for the purpose of informing the public, and not for the purpose of injuring the persons concerned, is privileged, and the publisher immune against liability, though the report contain matter that is false, defamatory, and injurious.—*Gazette Printing Co. v. Shallow*, 41 Can. Sup. St. 339, 15 Ann. Cas. 610, citing the English authorities; *Odgers on Libel & Slander* (4th Eng. Ed.) 291; *Brown v. Globe Printing Co.*, 213 Mo. 611, 112 S. W. 462, 127 Am. St. Rep. 627.

It is also settled in this state, as in most jurisdictions, that newspapers have no peculiar privileges of publication, and are subject to liability for libel just as ordinary persons are.—*Wofford v. Meeks*, 129 Ala. 349, 356, 30 South. 625, 55 L. R. A. 214, 87 Am. St. Rep. 66; *State v. Shepherd*, 177 Mo. 205, 76 S. W. 79, 99 Am. St. Rep. 624; *Negley v. Farrow*, 60 Md. 158, 45 Am. Rep. 715; *Williams Pint. Co. v. Saunders* (Va.) 73 S. E. 472.

So, newspapers, like persons, may discuss and criticise the conduct and motives of public officers without liability, if their comments are fair and reasonable. But for false aspersions upon their character newspapers and individual persons are equally liable, and the publisher of a libel upon a public official is without privilege, and can justify his publication only by proving that it is

[Parsons v. Age-Herald Pub. Co.]

true.—*Wofford v. Meeks*, 129 Ala. 349, 356, 30 South. 625, 55 L. R. A. 214, 87 Am. St. Rep. 66; *McAllister v. Detroit Free Press Pub. Co.*, 76 Mich. 338, 43 N. W. 431, 15 Am. St. Rep. 318, and note, 349; *Triggs v. Sun Printing, etc., Ass'n*, 179 N. Y. 144, 71 N. E. 739, 66 L. R. A. 612, 103 Am. St. Rep. 841, 1 Ann. Cas. 326.

The sufficiency of the quoted pleas must be tested in the light of these settled principles. If the fourth plea presents a good defense to the first and second counts, it must be upon the assumption that the official report of a grand jury, made to the court of which it forms a part, in open session, is such a "judicial proceeding" as comes within the rule of privilege with respect to such proceedings; or else that the public act of a public body, such as a grand jury, with respect to matters of public concern, is itself within the policy of the privilege, though in excess of the functions or duties with which it is clothed by law. And if the tenth plea presents a good defense to the third count, it must be upon the assumption that the statements therein charged are "fair and reasonable comments" upon the conduct of a public officer with respect to matters which concern the public, and not libelous statements of fact. These two propositions are vital to the whole case, and we have given them very deliberate consideration.

Though there has been some dissension of opinion, it seems to have been the common-law rule in England that the privilege attached to the report and publication of judicial proceedings extends to ex parte proceedings.—*Gazette Printing Co. v. Shallow*, *supra*; Odgers on Libel & Slander, p. 292. Nevertheless, such proceedings must have been taken or held "in open court," by which is meant any place where the court sits or exercises its jurisdiction, and from which the public are not excluded.—*Kimber v. Press Association* (1893) 1 Q. B. 65;

[Parsons v. Age-Herald Pub. Co.]

Metcalf v. Times Pub. Co., 20 R. I. 674, 40 Atl. 864, 78 Am. St. Rep. 900.

These principles prevail very generally in the United States, and the great weight of authority sustains the view that the publication of pleadings or other preliminary papers to which the attention of no judicial officer has been called and upon which no judicial action has been invoked is not within the privilege accorded to the publication of judicial proceedings in the absence of any statute modifying the rules of the common law.—*Isley v. Sentinel Co.*, 133 Wis. 20, 113 N. W. 425, 126 Am. St. Rep. 928. Such matters must have come up for public hearing or action in open court.—*Park v. Detroit Free Press Co.*, 72 Mich. 560, 40 N. W. 731, 1 L. R. A. 599, 16 Am. St. Rep. 544; *Nixon v. Dispatch Print. Co.*, 101 Minn. 309, 112 N. W. 258, 12 L. R. A. (N. S.) 188, 11 Ann. Cas. 161; *Cowley v. Pulsifer*, 137 Mass. 392, 50 Am. Rep. 318.

A grand jury is said to be a constituent part of the court, though it is also a distinct and partly independent body.—*Finley v. State*, 61 Ala. 204; *Fields v. State*, 121 Ala. 16, 17, 25 South. 726. And its functions, though always proceeding ex parte, are obviously of a judicial nature.

It is the duty of every grand jury to investigate any alleged incompetency or misconduct of any public officer in the county; and, if they find that any county officer ought to be removed from office for any impeachable offense named in section 7099 of the Code, they shall so report to the court, "setting forth the facts, which report shall be entered on the minutes of the court."—Code 1907, § 7124; *State v. Savage*, 89 Ala. 1, 7 South. 7, 183, 7 L. R. A. 426.

They are neither required nor authorized by any statute to report the result of such investigations when they

[Parsons v. Age-Herald Pub. Co.]

fail to find any impeachable fault or offense; and when they report and criticise any misconduct, real or fancied, of lesser grade, it cannot be for the purpose of invoking any judicial action, and is in fact no part of any judicial proceeding, actual or potential. Of course, these observations do not apply to the duties specially enjoined upon the grand jury by law to examine and report upon the several public matters named in sections 7287-7292 of the Code, with which we are not here concerned.

Our conclusion is that that part of the grand jury's report dealing with the official conduct of the plaintiff was no part of any "judicial proceeding" within the rule of qualified privilege recognized by the common law in respect to the publication of such proceedings, and that it is not privileged as being the publication of a report required or authorized by law.

Nevertheless, we think its publication by the defendant, under the conditions averred in the plea, is within the spirit and policy of that rule. The grand jury is essentially a public body, and what it says or does in regard to public matters, though stopping short of indictment or impeachment, is a matter of public interest; and, with respect to the official conduct of public officers in the county, is a matter of such public concern as to justify its communication to the public for the information, through the public press or other appropriate agencies.

We cannot overlook the fact, which is a matter of common knowledge, that grand juries in this state have immemorially exercised this form of supervision over the official conduct of county officers, and have from time to time admonished them of alleged official misconduct, and criticised them for supposed official improprieties, and have brought such matters to the attention of the

[Parsons v. Age-Herald Pub. Co.]

public, as a part of their general report to the court. This practice has the sanction at least of general custom, and may perhaps be justified by considerations of public welfare or necessity. Doubtless it has exercised a very wholesome influence upon the conduct of many public officers, and has been, on the whole, of vast benefit to the government and to the people—although it may have occasionally resulted in injustice to individuals.

The extension of the old English rule to public reports of public bodies, within the general sphere of their authorized or customary activities, has been long recognized in Massachusetts.—*Barrows v. Bell*, 73 Mass. (7 Gray) 301, 66 Am. Dec. 479; *Kimball v. Post Pub. Co.*, 199 Mass. 248, 85 N. E. 103, 19 L. R. A. (N. S.) 862. In *Barrows v. Bell*, *supra*, it was said, per Shaw C. J., that, “whatever may be the rule as adopted and practiced in England, we think that a somewhat larger liberty may be claimed in this country and in this commonwealth, both for the proceedings before all public bodies, and for the publication of those proceedings for the necessary information of the people.”

In 18 Am. & Eng. Ency. Law (2d Ed.) 1046, the consensus of the authorities is thus stated: “While it has been held that the publication of matter defamatory of an individual is not privileged merely because the libel is contained in a fair report in a newspaper or pamphlet of what occurred at a meeting held for a public purpose, yet it seems to be the prevailing rule that proceedings, if of public interest, need not be those of a judicial or legislative body to render a fair report thereof privileged.”

In applying this general rule to cases like the present, discrimination is necessary; and we observe: (1) That libelous imputations in a grand jury’s report upon private citizens, or upon public officers, not touching their fitness for office or their fidelity to the public service, or

[Parsons v. Age-Herald Pub. Co.]

the propriety of their official acts, are not properly matters of public interest; (2) that the privilege does not attach at all until the report has been duly published by the grand jury itself in open court; and (3) that matters, the publication of which is forbidden by law, or by the order of the court as being improper for publication, are not to be regarded as privileged with respect to their publication by third persons.

The law on this subject is, we conceive, a compromise between private rights and the public good, and other cases must be decided as they arise, with a due regard for these conflicting interests.

We hold that the demurrers to the fourth plea were properly overruled, and that the charges of the court upon the issues therein formulated were correct statements of the law applicable thereto.

By comparison with the fourth plea, it seems that the sixth and seventh pleas were defective in not showing that the grand jury report had been presented and published by them in open court, but the defect is not pointed out by the demurrers.

It is to be observed in this connection that, while the fairness and accuracy of the published report is in general a question for the jury, yet, where the matter published is a verbatim report of the original matter, without comment or criticism, it must be deemed fair and accurate as a matter of law.

We come now to the consideration of the issues presented by the third count of the complaint, the tenth plea interposed as a defense thereto, and the replications.

The minute entry shows that demurrers to this plea were considered and overruled; but the record does not show what the grounds of demurrer were, and hence we are bound to presume in favor of that ruling that the grounds assigned to this plea were without merit.

[Parsons v. Age-Herald Pub. Co.]

Of the four replications filed by plaintiff, the only one applicable to this plea is the third: "The said comment published by the defendant or the citizen was not confined to such comment upon the alleged facts, but sought to set up additional facts." This is no more than a denial of one of the necessary averments of the plea, and its elimination as a special reply was without prejudice to plaintiff.

Fair comment upon the conduct of public men, when made in good faith without malice, is said to be privileged. But a very just distinction is drawn between fair comment and libelous statements of fact, and "the right to criticise does not embrace the right to make false statements of fact, to attack the private character of a public officer, or to falsely impute to him malfeasance or misconduct in office."—25 Cyc. 403. The privilege is limited to comment or criticism, and must be with reference to admitted or proven facts or conduct. Such comment should not go beyond the expression of legitimate inference, conclusion, or opinion, based upon such matters; and, if it does, it cannot be regarded as fair.—*Risk Allah Bey v. Whitehurst*, 18 L. T. 515; *Davis v. Shepstone*, 11 App. Cas. 187, 190; *Triggs v. Sun Printing, etc., Ass'n*, 179 N. Y. 144, 71 N. E. 739, 66 L. R. A. 612, 103 Am. St. Rep. 841, 848, 1 Ann. Cas. 326; *Coleman v. MacLennan*, 78 Kan. 711, 98 Pac. 281, 20 L. R. A. (N. S.) 361, 130 Am. St. Rep. 390, 411; *Upton v. Hume*, 24 Or. 420, 33 Pac. 810, 21 L. R. A. 493, 41 Am. St. Rep. 863, 867; *Burt v. Adv. Newspaper Co.*, 154 Mass. 242, 28 N. E. 1, 13 L. R. A. 97; *Negley v. Farrow*, 60 Md. 158, 45 Am. Rep. 715; *Hamilton v. Eno*, 81 N. Y. 116.

Whether the libel complained of may fall within this rule of privilege is a question of law for the court; and, conceding the occasion, whether the comment or criti-

[Parsons v. Age-Herald Pub. Co.]

cism is fair is a question of fact for the jury, under proper instructions from the court.

The libelous matter set out in the third count contains, besides a general allusion to the grand jury report, specific charges of reprehensible conduct, viz., "One young woman who had been humiliated and dragged into the inferior court should have sued the constable for his acts," and, "I think there will be found a way to impeach this officer of the law who preys upon the poor and unfortunate." The tenth plea avers that this was fair and reasonable comment concerning public offices and public officers, and hence conditionally privileged.

So far as the first of the quoted statements is concerned, the evidence shows that it referred to the acts of plaintiff, as constable, in the execution of a certain writ of attachment in the case of *Seawright v. Taylor*, in the inferior court. It appears that the "young woman" referred to had rented a bed to the "citizen," and it was, when taken by the constable under the writ, in the house of the defendant in attachment where the citizen was a lodger; and it further appears that the attorney for the plaintiff in attachment directed the constable to make the levy, and instructed him to hold it until the claim made to it was tried and determined by law, and that the young woman's claim suit afterwards interposed resulted in a judgment in her favor for the bed.

On these facts it was for the jury to say whether the comment in question was fair and reasonable, or otherwise.

On the other hand, the charge that plaintiff, as constable, "preys upon the poor and unfortunate," is, so far as the evidence shows, wholly without foundation and is not even referable to any alleged conduct by such officer. It is a general and sweeping charge of obnoxious and disgraceful abuse of official power, with the imputation of

[Parsons v. Age-Herald Pub. Co.]

evil and unworthy motives. As matter of law, it falls outside of the scope of comment and criticism, as we understand their field of operation; and, it being clearly libelous per se, and there being neither plea nor proof of its truth, plaintiff was on the whole pleading and evidence entitled to recover under his third count, if in fact the language was spoken of plaintiff, and capable of being so understood by those who knew him—questions of fact on the evidence adduced.

In this view of the case, the trial court erred in refusing to give at plaintiff's request in writing an instruction to the jury that they could not find for defendant on the tenth plea, if they believed the evidence.

The same instruction might well have been given as to the fourth and fifth pleas, in so far as they answered the third count. But the instructions requested (1, 2, and 3) were not thus restricted, and hence were properly refused.

Under the general issue in mitigation of damages defendant could show the truth or partial truth of any of the alleged defamatory matter.—25 Cyc. 479B(2). To this end the court papers in *Schillenger v. Stow* were admissible to show the fact and character of such proceedings, in connection with which plaintiff was charged with official improprieties.

There was no error in the admission of the letter written by plaintiff to defendant in regard to the publications complained of. It gave his version of the transaction, and was legal evidence against him or for him when offered by the other party.

The observations of "a citizen," as set out in the third count, were written by one Clarke, who was not in any way connected with defendant or its newspaper. Testifying as a witness for defendant, plaintiff asked Clarke on cross-examination if he had not afterwards told sev-

[Hanchey v. Brunson.]

eral persons that his article referred to plaintiff. There was nothing in the witness' direct testimony that could justify this question, and not being an agent or servant of defendant, nor in its service at the time of the statement inquired about, that statement was as to this defendant merely hearsay and *res inter alios acta*, and not admissible in evidence.

Other questions raised on charges and evidence will not be discussed, as they may not arise again.

For the error above pointed out, the judgment will be reversed, and the cause remanded.

Reversed and remanded.

DOWDELL, C. J., and MCCLELLAN and SAYRE, JJ., concur.

Hanchey v. Brunson.

Malicious Prosecution.

(Decided February 14, 1913. 61 South. 258.)

Appeal and Error; Review; Presumptions; Amendments to Pleading.—Under section 5367, Code 1907, an order requiring plaintiff to pay the cost as a condition to the allowance of his amendment not negativing the fact that the amendment would cause an injustice to defendant, it will be presumed that conditions existed which justified the trial court in imposing such cost, and his action thereon will not be reviewed on appeal.

APPEAL from Coffee Circuit Court.

Heard before Hon. H. A. PEARCE.

Action by William J. Hanchey against John F. Brunson for malicious prosecution. Judgment for defendant, and plaintiff appeals. Affirmed.

A. G. SEAY, for appellant. The court erred in imposing costs as a condition precedent to allowing the amend-

[Hanchey v. Brunson.]

ments offered.—*Hanchey v. Brunson*, 56 South. 971; Sec. 5367, Code 1907.

J. A. CARNLEY, for appellee. The record does not disclose, but what injustice would result to defendant, and the court properly imposed cost as conditions, and this court will presume that there was matter justifying such imposition of cost.—Sec. 5367, Code 1907.

ANDERSON, J.—The sole question presented by this appeal is whether or not the trial court can be reversed for requiring of the plaintiff the payment of the cost of the term as a condition precedent to the allowance of the amendment of the complaint.

Section 5367 of the Code of 1907 authorizes amendments during the progress of the case, without cost or delay, unless injustice will thereby be done the opposite party. It must be observed that a party has the right to amend in any instance covered by the statute, and at any time during the progress of the case, and without cost or delay unless an injustice is thereby done the opposite party. If the proposed amendment should take the opposite party by surprise, or necessitate a continuance of the case, the trial court would no doubt have the discretion to impose cost or a continuance, one or both, as a condition precedent to the allowance of the amendment. On the other hand, if the amendment does not take the opposite party by surprise and he is ready to meet the amendment and proceed with the trial of the case, it is difficult to see how the said amendment can work an injustice to the opposite party, and, if it does not do so, the amendment should be allowed without cost or delay. The present amendment was attempted after the parties had announced ready for trial and had selected the jury, but could not have been necessitated by a surprise as to

[Hanchey v. Brunson.]

the evidence, as no proof had been taken when it was offered. The amendment predicated the right of action upon a prosecution commenced before a different officer from the one named in the original complaint, and it may have taken the defendant by surprise, and he may have wanted a continuance in order to meet the new phase of the case, and, if the said amendment would necessitate a delay, the trial court had the authority to impose reasonable terms upon the plaintiff, as a condition precedent to the allowance of same. The bill of exceptions does not purport to set out all the evidence, and, from aught that appears, the defendant may have objected to the amendment and may have stated to the court that he was not ready to meet same, and would have to ask a continuance if the same was allowed. We cannot, therefore, put the trial court in error for taxing the plaintiff with the cost of the term as a condition precedent to the allowance of the amendment to the complaint. It may be that the trial court was in error in stating that the plaintiff was in default for not having made the amendment the day before the case was called for trial, as he could not make the amendment except with leave of the court and could not well ask for same until the case was called by the court; yet there is nothing in the bill of exceptions to negative the fact that the amendment would operate to cause a delay or injustice to the defendant, and, nothing to the contrary appearing in the bill of exceptions, we must presume that conditions existed which justified the trial court in imposing the cost of the term upon the plaintiff as a condition precedent to the amendment of the complaint.

The judgment of the circuit court is affirmed.

Affirmed.

DOWDELL, C. J., and MAYFIELD and DE GRAFFENBRIED, JJ., concur.

[Jebeles-Colias Conf. Co. v. Booze.]

Jebeles-Colias Conf. Co. v. Booze.*Assault and Battery.*

(Decided April 17, 1913. Rehearing stricken May 8, 1913.
62 South. 12.)

1. *Master and Servant; Assault by Servant; Line of Duty; Evidence.*—Evidence that plaintiff had been in the employment of defendant corporation and had been discharging his duties under the personal direction and control of C, and that C discharged the plaintiff because of a difference between them about plaintiff's manner of doing his work, and assaulted plaintiff while he was leaving but was still in defendant's place of business, authorizes a finding that the assault was committed in the course of C's employment, and within the line of duty assigned him so as to make the defendant liable, where there was an absence of evidence that the assault grew out of anything other than such differences, and the fact and manner of dismissal.

2. *Same; Complaint.*—A complaint charging that C, an agent and servant of defendant corporation, while engaged in or about defendant's business and acting within the line and scope of his authority as such agent or servant, wantonly and violently assaulted and beat plaintiff with a stick, causing injuries, is sufficient.

3. *Same; Instructions.*—Where the defense was that the assault was by another servant of defendant who had no duties to perform at the place of the assault, and all the testimony showed that C was, at the time of the assault, an agent of defendant, in charge of that part of the premises where plaintiff's duties were performed, and in personal command of plaintiff while he remained in defendant's service, and where the assault was committed just after he had discharged plaintiff, a charge asserting that the verdict must be for defendant, if the jury believe from all the evidence that plaintiff was assaulted "as alleged in the complaint," but that it was committed by someone not an agent or employee of defendant, provided they believed defendant did not authorize or instigate the assault, needed some construction to prevent misleading tendencies justifying its refusal.

4. *Witnesses; Contradiction.*—While one offering a witness in general represents him as worthy of belief, and cannot impeach his general character for truth or impugn his credibility by general evidence tending to show him unworthy of belief, yet he may prove any fact by other competent witnesses in direct contradiction of such witness though the collateral effect is to show such witness generally unworthy of belief, and under some circumstances may ask him whether he has not made other inconsistent statements.

5. *Charge of Court; Credibility of Witness.*—Where other witnesses for plaintiff had testified differently to the same fact, a charge requested by defendant that plaintiff vouched for the truth-

[Jebeles-Colias Conf. Co. v. Booze.]

fulness of the witness N when he placed him on the witness stand, was misleading in the absence of a statement that plaintiff was not concluded on the facts as to which N testified to.

6. *Same; Needing Construction.*—Where a requested instruction needs some construction to prevent its being misleading, its refusal is justified.

7. *Appeal and Error; Supplemental Brief; Points Not Previously Urged.*—The supplemental brief that is permitted by the rule must support assignments urged in the brief required to be filed as a prerequisite to the submission of the cause; hence, a supplemental brief filed after the submission of the cause for decision which attempts to make points that have not been referred to in the original brief comes too late.

APPEAL from Jefferson Circuit Court.

Heard before Hon. JOHN C. PUGH.

Action by Jim Booze against the Jebeles & Colias Confectionery Company, for damages for assault and battery. Judgment for plaintiff, and defendant appeals. Affirmed.

The appellant corporation conducts a bakery and candy business, and in their place of business on or about the 5th of October, 1910, plaintiff was struck with a piece of scantling; some of the testimony tending to show that the blow was struck by Colias, and the other testimony tending to show that the blow was struck by Darious, who was in the employ of the corporation and closely resembled Colias. The complaint charged that on the 6th day of October, 1910, Nicholeas Colias, an agent or servant of the defendant, while engaged in and about the business of defendant, and acting within the line and scope of his authority as such agent or servant willfully, wantonly, and violently assaulted and beat plaintiff, by striking him over the head with a piece of wood or other blunt instrument, greatly mashing and bruising plaintiff's head; "and plaintiff avers that by reason thereof, and as a proximate consequence of the willful, wanton, and violent assault made on him by the agent or servant of defendant, as above set out [here fol-

[Jebeles-Colias Conf. Co. v. Booze.]

lows catalogue of physical and mental injuries, etc.].” This is the second count. The demurrers to that count are that it seeks to recover for the act of defendant’s agent or servant, and it is not averred or shown what service or employment the said defendant or its said servant or agent was engaged in, or that there was any duty upon defendant to protect plaintiff from the assaults of its servant or agent, and that it seeks to recover punitive damages without showing that defendant was authorized to commit said assault, or that the same was ratified or acquiesced in by the defendant, and that, so far as appeared from said count, plaintiff and some agent or servant of defendant engaged in a personal affray without reference to the corporate business of defendant.

The following charges were refused to defendant :

“(2) If you believe from all the evidence that plaintiff was assaulted as alleged in said complaint, but that said assault was committed by some person not an agent or employee of defendant, you must give a verdict in favor of defendant, provided you believe that defendant did not authorize or instigate such assault.” “(6) I charge you under all the evidence in this case that the plaintiff vouched for the truthfulness of the witness J. S. Nix, when he placed said Nix on the witness stand.”

The following charge was given for plaintiff :

“A. If the jury believe from the evidence that Nicholas Colias, while acting as manager or boss of Jebeles & Colias Confectionery Company’s place of business, where the assault is alleged to have been committed, while acting within the line and scope of his authority, as such manager or boss, wrongfully struck, assaulted, and beat plaintiff, then Jebeles & Colias Confectionery Company, the defendant in this suit, is liable in damages for such

[Jebeles-Colias Conf. Co. v. Booze.]

assault and battery, and the plaintiff is entitled to recover in this case."

F. E. BLACKBURN, and C. B. POWELL, for appellant. The court erred in the charge given at the request of plaintiff.—*Palos C. & C. Co. v. Benson*, 39 South. 727; *L. & N. v. Whitman*, 79 Ala. 328; *Wise v. Curl*, 58 South. 287. On these same authorities, the court below erred in overruling demurrers to the second count of the complaint. A party vouches for the truthfulness of the witness offered by him, and the court was in error in refusing the charge asserting that doctrine requested by defendant.—*Warren, et al. v. Gabriel & Co.*, 51 Ala. 235. The court erred in refusing to give charge 2 requested by appellant. Counsel filed a supplemental brief touching assignments not argued in the original brief.

C. D. RITTER, for appellee. There was no error in the charge given for appellee, or in overruling demurrers to the second count of complaint.—*Morris H. Co. v. Hendley*, 40 South. 52; *Case v. Hulseybush*, 122 Ala. 212; *A. G. S. v. Frazer*, 9 South. 303. The court was not in error in refusing the charge asserting that plaintiff vouched for the truthfulness of his witness Nix, as the charge did not indicate that plaintiff was not concluded by his testimony. There was no error in refusing the charges requested by defendant.

SAYRE, J.—There was ample evidence to warrant the jury in finding that plaintiff (appellee) had been in the employment of the defendant corporation, and had discharged his duties under the personal direction and control of Colias; that on the occasion in question Colias had discharged plaintiff on account of some difference which had arisen between them about plaintiff's man-

[Jebeles-Collas Conf. Co. v. Booze.]

ner of doing his work, and then, while plaintiff was in the act of leaving, but was still in defendant's place of business, had committed an aggravated assault upon him. There was nothing in the testimony to indicate that the assault grew out of anything other than the difference indicated above and some temper evolved from the fact and manner of plaintiff's dismissal from defendant's service. The jury were authorized, therefore, to find that the assault was committed in the course of Collas' employment and in the line of his assigned duties, and that defendant corporation was liable for its consequences.—*Gassenheimer v. Western of Alabama*, 175 Ala. 319, 57 South. 718, 40 L. R. A. (N. S.) 998; *Case v. Hulsebush*, 122 Ala. 212, 26 South. 155. The cases just cited also suffice to show that the sufficiency of the second count of the complaint, upon which the case was tried, was correctly adjudged on demurrer.

It is hornbook law that when a party offers a witness in proof of his cause, he thereby, in general, represents him as worthy of belief, and cannot afterwards impeach his general character for truth or impugn his credibility by general evidence tending to show him to be unworthy of belief; but it is exceedingly clear that the party is not precluded from proving the truth of any particular fact, by other competent testimony, in direct contradiction of his witness, though the collateral effect may be to show that the witness was generally unworthy of belief.—1 Greenl. Ev. §§ 442 443; *Warren v. Gabriel*, 51 Ala. 235. And under some conditions he may ask his witness whether he has not made other inconsistent statements.—*Schieffelin v. Schieffelin*, 127 Ala. 35, 28 South. 687.

Though charge 6, refused to the defendant, be taken as a correct statement of the general law of the subject as far as it went, yet in view of particular developments of the evidence it needed qualification and amplification

[Jebeles-Collas Conf. Co. v. Booze.]

to save it from being a partial and misleading statement of that branch of the law of the case with which it undertook to deal. Plaintiff made no formal effort to impeach the general credit of his witness Nix. He did, however, offer evidence from which the jury might, and it seems did, infer that the testimony of the witness was evasive or even positively and consciously untrue. For the court to say to the jury in these circumstances that plaintiff had "vouched for the truthfulness of the witness," without a statement of the mere general character of that avouchment, and that it did not conclude plaintiff on the particular facts as to which the witness testified, would, in our opinion have left a false, or at least an incomplete and misleading, impression upon their minds, and was therefore refused without error.

The cases heretofore cited are enough to show that charge A, given at plaintiff's request, was properly given. In *Morris Hotel Co. v. Henley*, 145 Ala. 678, 40 South. 52, it was held that the same charge, *mutatis mutandis*, in a similar case, was given without error.

Strictly construed, and to save error, we must so construe charges refused in the court below, charge 2 was refused to defendant without error. In fact, the charge seems to need some construction to avoid misleading, and that was enough to justify its refusal. There was no plea of justification. The defense was rested upon the proposition that defendant's agent or servant, named in the complaint, had not committed the assault, but that another person, who also appeared to have been a servant of defendant, though it did not appear that he had any duties to perform in defendant's place of business—he drove a wagon on the outside—had assaulted plaintiff. So that, if the assault was committed "as alleged in the complaint," plaintiff was entitled to recover without more. It was necessary, of course, that plaintiff

[Jebeles-Collas Conf. Co. v. Booze.]

should satisfy the jury reasonably that the named agent was in fact the agent of defendant, but about that fact there was no dispute or conflict in the evidence. Defendant denied that its agent named in the complaint was at the time an officer of the defendant corporation; but he may have been an agent or servant without being an officer, and defendant's testimony as well as that offered by plaintiff, went without contradiction to show that he was an agent at the time in charge of that part of defendant's premises where plaintiff's duties were performed, and in personal command of plaintiff while he remained in the service. There was no error in the refusal of the charge.

It has been settled by this court that the points made in appellant's supplemental brief, filed some time after the submission of the cause for decision, such points not having been referred to in the original brief upon which the submission was had, came too late and cannot be considered. The additional brief which an appellant may file under the rule must support assignments of error, urged in the brief required to be filed as a prerequisite to the submission of the cause.—*L. & N. v. Holland*, 173 Ala. 675, 55 South. 1001. We are much inclined to think, from some examination of them, that there is no merit in these belated points, but withhold more definite statement for the reason above indicated.

We find no error in the record, and the judgment will be affirmed.

Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

[Republic I. & S. Co. v. Passafume.]

Republic I. & S. Co. v. Passafume.

Assault and Battery.

(Decided February 13, 1913. 61 South. 327.)

1. *Evidence; Res Gestae; Agency.*—Where the action was for damages for assault and battery committed by the employees of defendant corporation while acting within the scope of their employment, it was not error to admit evidence that other parties were arrested shortly after plaintiff was shot, where the shooting and the arrest were closely related, and the court limited such evidence to proof of agency existing between defendant and the persons who shot plaintiff.

2. *Same; Opinion; Knowledge Essential.*—While a witness may testify whether certain things may be seen from a given point, it is necessary that he shall actually know whether the things could have been thus seen, and that his testimony is not a mere expression of opinion.

3. *Principal and Agent; Proof of; Circumstantial Evidence.*—Agency may be proved by circumstantial evidence, and may be inferred from other acts similar to the one in question.

4. *Assault and Battery; Evidence.*—Where plaintiff's witness testified that he was standing on a railroad track some distance away, and saw the shot fired that hit plaintiff, the testimony of a witness for defendant who stated that he stood about thirty feet from where the shot was fired, as to whether he could see a man on a railroad track from where he was standing, was properly excluded.

5. *Trial; Argument of Counsel.*—While it is improper for the court in its charge to the jury to state that plaintiff's counsel had so ably stated the law of life expectancy that it was unnecessary for the court to rehearse it, yet where it appeared that counsel had properly stated the law, it cannot be said that the court's charge was erroneous.

(Mayfield, J., dissents.)

APPEAL from Jefferson Circuit Court.

Heard before Hon. E. C. CROWE.

Action by Sam Passafume against the Republic Iron & Steel Company for damages for assault and battery. Judgment for plaintiff, and defendant appeals. Affirmed.

The case made by the complaint is that defendant had a large force of men employed to protect its prop-

[Republic I. & S. Co. v. Passafume.]

erty against trespass, and to keep people off its premises, and that these agents, servants, or employes of defendant assaulted and beat and shot the plaintiff while engaged in the business of defendant, and within the line and scope of their employment.

PERCY, BENNERS & BURR, for appellant. Most of the occurrence to which the evidence relates happened after the shooting, and were hence, not a part of the *res gestæ*, and should not have been allowed. The court erred in declining to permit Dodd to answer if he could have seen a man standing on the Southern Railway from where he was standing.—*So. Ry. v. Bonner*, 141 Ala. 517; *A. G. S. v. Lynn*, 103 Ala. 134; *McVay v. State*, 100 Ala. 110; *E. T. V. & G. v. Watson*, 90 Ala. 41; *Cox v. State*, 76 Ala. 66. The court erred greatly to the prejudice of appellant in its oral charge.—105 N. W. 594; 70 Ga. 714; *Gothran v. Moore*, 1 Ala. 423; 11 Enc. P. & P. 154. Charges which refer to the jury parts of the pleading as part of the charge, are erroneous.—*B. R. L. & P. Co. v. Fox*, 56 South. 1013; *A. G. S. v. McWhorter*, 47 South. 84; *B. R. L. & P. Co. v. Hayes*, 44 South. 1032; *Equitable M. Co. v. Howard*, 148 Ala. 664.

FRANK S. WHITE & SONS, for appellee. No brief reached the Reporter.

DE GRAFFENRIED, J.—The members of this court, except Mr. Justice MAYFIELD, are of the opinion that there is no reversible error in this record, and this opinion is written for the purpose of giving expression to the views of a majority of the court upon the questions here presented.

1. All of the members of this court are of the opinion that the trial judge committed no error in allowing testi-

[Republic I. & S. Co. v. Passafume.]

mony that parties other than Sam Passafume were arrested shortly after the plaintiff, Sam Passafume, was shot. This testimony was expressly limited by the court, when it was admitted, to proof of agency, as tending to show that the persons who shot the plaintiff and arrested the other parties were acting as agents of the defendant. The shooting and the arrests were closely related, if not parts of the same occurrence. Standing alone, this evidence may have been weak, but in connection with the other facts which appear in the record it became strong. While, at the time this evidence was offered, there had not then been offered other evidence tending to show agency, that evidence was at a later stage of the proceedings introduced.

Agency may be proven by circumstantial evidence, and may be inferred from other acts similar to the one in question.—*Hill v. Helton*, 80 Ala. 528, 1 South. 340.

2. While a witness who is shown to have a knowledge of the facts inquired about may testify that certain things, the subjects of injury, could have been seen, or could not have been seen, from a given point to another given point, nevertheless, in order to so testify, it must be shown that such a witness actually knows that the things could or could not have been seen. In other words, his testimony must not amount to a mere expression of opinion. It must amount to a shorthand rendering of facts within the personal knowledge of the witness.

During the progress of the trial a witness for the plaintiff, W. L. Jones, testified that he stood on the Southern Railway, and saw Frank Phillips shooting. The scene of the shooting was some distance from the Southern Railway. At a later stage of the proceeding, the defendant offered a witness, Dodd, who testified that: "It was 200 or 300 yards from the place of the

[Republic I. & S. Co. v. Passafume.]

shooting to the Southern Railway." Being asked, if he went up the road shown on the diagram drawn on the blackboard to which the witnesses referred in their testimony until he came to the Southern Railway, how far he would be on the Southern Railway from the depot at Republic, he answered that to the best of his recollection it would be 150 to 200 yards. He further testified that he stood about *"30 feet from the place where Frank Phillips stood in doing the shooting."* The trial judge refused to allow the witness to answer the following question propounded to him by the defendant: "Could you have seen a man standing on the Southern Railway from *where you were standing?* As this witness was standing 30 feet from Frank Phillips during the shooting, the witness' answer to the above question could not have shed any legitimate light upon the question as to whether W. L. Jones, on the Southern Railway, saw Frank Phillips shooting. A tree or some other obstruction might have prevented a man standing where witness Dodd stood during the shooting from seeing a man standing on the Southern Railway, while no tree and no other obstruction may have existed which would have prevented Phillips—30 feet from Dodd—from seeing a man on said railway. Other reasons might be advanced which would show that the answer would have been irrelevant and of no material aid to the defendant, but we deem further discussion of the point unnecessary.

3. During his oral charge to the jury the trial judge used the following language "Capt. White has so ably laid down the law of expectancy and the rules that might govern you in the event you were to find for the plaintiff on that I do not deem it necessary to undertake to describe it further, for, were I to do so, I might confuse you, and I feel now he has stated the law so

[Republic I. & S. Co. v. Passafume.]

plainly that it is not necessary for me to rehearse it." While the trial judge did not we feel confident intend by the above remarks to give undue prominence and weight to the argument of one of the plaintiff's counsel, the necessary tendency of the remarks was to do so. All of the members of this court are agreed upon the proposition that the remarks were improper. A majority of the members of this court regard the remarks as highly improper, and Mr. Justice MAYFIELD is of the opinion that this cause should be reversed, and a new trial awarded the defendant because of them.

Parties to a cause are entitled to have all of the law of the case given to the jury from the lips of the presiding judge. He is in his court the representative of the law, and the law should come from him. The offices of counsel and those of the presiding judge are entirely distinct, and words from a counsel do not, and cannot, carry that judicial weight which attaches to them when they come from the lips of the judge, who is the judicial arbiter of all legal disputes. When a trial judge is charging a jury, counsel on both sides are attentive to all that he says. It is now the growing custom for his charge to be taken down verbatim by a stenographer. Counsel seize upon his every word, and, if they think that he has committed error against their client, they are present and ready to reserve their exception. This is not true with reference to the arguments of counsel. While the argument is in progress, opposing counsel keep up in a general way with the trend of the argument, but, as the law is expected to come from the court, they are not expected to weigh, with exact nicety, every word and sentence used in the argument. As a rule, the arguments of counsel are not committed to writing by a stenographer, and, after the argument is concluded, it is difficult to remember all that was said by

[Republic I. & S. Co. v. Passafume.]

counsel upon a given point. The present bill of exceptions sets out, as we have above quoted it, the remarks of the counsel which were afterwards adopted by the court as a part of his oral charge to the jury; but just below those remarks we find in the bill of exceptions the following: "Defendant's counsel protests that the above is not all that counsel said, but, being overruled, acquiesces." This shows that there was a dispute as to what was, in fact, the charge of the court on the subject of the life expectancy of the plaintiff. This dispute would probably not have occurred if the trial judge had in his own words charged the jury on the subject.

We have, we presume, said enough to indicate that in the future trial judges should be careful to avoid pursuing the course which was pursued by the trial judge in the instant case.

The statement which the counsel made in his address to the jury and which was adopted by the trial judge as a part of his oral charge to the jury was not, however, as it appears in the bill of exceptions, an incorrect statement of the law. It cannot, therefore, be said that the charge of the court on the subject was erroneous.

We are therefore of the opinion that the judgment of the court below must be affirmed.

Affirmed.

DOWDELL, C. J., and ANDERSON, MCCLELLAN, SOMERVILLE, and DE GRAFFENRIED, JJ., concur.

MAYFIELD, J.—(dissenting).—The trial court in my opinion erred in declining to allow the witness Dodd to testify as to whether or not he could see a man standing on the Southern Railway from the scene of the shooting. The court sustained an objection to a ques-

[Republic I. & S. Co. v. Passafume.]

tion calling for this answer, on the ground that the question called for a conclusion or opinion of the witness. Under the facts shown, such evidence would not have been objectionable on this ground, nor on any other, so far as I can see or know. The witness was shown to have been on the ground and to have had the opportunity of knowing as a fact whether a man on the Southern Railway could have been seen from the scene of the shooting. This was made relevant by the plaintiff having introduced a witness Jones, who testified that he was on the Southern Railway, and from that point he saw the shooting which injured plaintiff. This evidence was therefore competent as tending to rebut or disprove this testimony of the plaintiff.

It has been repeatedly held by this court that a witness who is shown to have a personal knowledge as to the facts inquired about may testify as to whether certain things inquired of could have been seen or heard from one given point to another.—*Bonnors' Case*, 141 Ala. 517, 37 South. 702; *Moody's Case*, 92 Ala. 279, 9 South. 238; *Cox v. State*, 76 Ala. 66; *McVay's Case*, 100 Ala. 110, 14 South. 862; *Linn's Case*, 103 Ala. 134, 15 South. 508; *Watson's Case*, 90 Ala. 41-45, 7 South. 813. I am also of the opinion that the trial court fell into reversible error in his instruction to, or declination to instruct, the jury, as to the rules of law governing them in regard to plaintiff's life expectancy. That portion of the charge or declination to charge on this subject, and to which an exception was reserved, was as follows: "Capt. White has so ably laid down the law of expectancy and the rules that might govern you in the event you were to find for the plaintiff on that I do not deem it necessary to undertake to describe it further, for, were I to do so, I might confuse you, and I feel now that he has stated the law so plainly that it is

[Republic I. & S. Co. v. Passafume.]

not necessary for me to rehearse it." This was nothing more nor less than express declination on the part of the trial court to instruct the jury as to the law of the case upon this particular subject further than to refer them to what counsel for plaintiff has said to him upon this subject. This was in effect telling them to do what the plaintiff's counsel said on this subject, if they found for the plaintiff. The court had no right to do this, even though counsel for the plaintiff had stated the law correctly on this subject. It was the duty of the court to instruct the jury on the law as to this subject which was an important element in the case, and the defendant had a right to hear that instruction, and to except to it if defendant thought it was incorrect. It is not the office or function of counsel to instruct the jury as to the law of the case, but that duty the law enjoins upon the judge or judges of the court, and the judge cannot and ought not to be allowed to delegate that authority or power to counsel. While it is the duty of counsel to aid and instruct the judge or court as to the law of the case, it is not his duty or right to instruct the jury upon this question; but to aid them in finding the truth and the facts from the evidence in the case. Suppose a party or his counsel should not have heard the argument of opposing counsel as to the rule of law in question (and he is not required to hear it, although allowed so to do), then he could never know whether the law was charged correctly. He could object or except only in the manner in which the defendant did in this case. This is a practice which should not be allowed, much less encouraged. I do not for one moment suspect that the trial court intended any wrong or injury in making this statement to the jury, but it was nevertheless error.

Under our system of procedure and practice, the litigants have a right to have the court or the judge thereof

[Republic I. & S. Co. v. Passafume.]

instruct the jury as to the law of the case litigated, and this right cannot be denied, nor the duty imposed avoided, by telling the jury that counsel have stated the law correctly, if either one excepts to such action. BRICKELL, C. J., in the case of *Woodbury v. State*, 69 Ala. 245, 44 Am. Rep. 515, had this to say, when the trial court merely read his charge from other decisions of this court: "The instructions were probably intended to be literal extracts from opinions of this court, defining this offense, embodying its elements, so far as the facts of the particular cases, and the questions involved required a definition of the offense, and a description of its constituent ingredients. As applied to the particular cases, the court is committed to their correctness as legal propositions. But it is very far from being a satisfaction of the duty of a primary court in instructing the jury to borrow these propositions, and recite these definitions, without adaptation of them to the facts of the case which is submitted for the consideration and determination of the jury. The mere recitation of definitions, or of elementary principles, is more often calculated to confuse and mislead than to instruct a jury. The instruction given by the court affirmatively ex mero motu should present the particular case in all the phases and aspects in which the jury ought to consider it, not giving any undue prominence to, or leaving in obscurity, any phase or aspect there is evidence tending to support; and if such instructions in effect discard or ignore, and thereby induce the jury to discard or ignore any legal, material element of the offense imputed to the accused, they ought not to be supported." CHILTON, C. J., said, in speaking of erroneous remarks or charges of the court, that, "when error is shown, injury will be presumed, unless the record clearly shows that no injury resulted."

[Republic I. & S. Co. v. Passafume.]

In *Maxwell's Case*, 89 Ala. 164, 7 South. 828, McCLELLAN, J., in speaking of the doctrine of error without injury, said he thought the rule was the same in civil and criminal cases, though it was adhered to more strictly in criminal than in civil cases. We quote from that opinion that: "It may be, indeed, it is highly probable, that this evidence did not prejudice the defendant. Nay, further, we are utterly unable to see that it did or could have worked him injury. But on the other hand, we *cannot affirmatively see that it did not injure him*, and we do not feel that safety and certainty, which the rule even in civil cases requires to rebut the presumption of injury from error, that no harm was done which would warrant us in holding this error to have been without prejudice." An appellate court can only review the action of a judge—not that of a jury. It can review the action of a judge only by virtue of a statute. It is a very old statute, but not as old as jury trial. It is said to be the best feature of the jury system that the law is interpreted by professional men and applied by laymen, that by this means the law is divested of all that is not readily comprehended by all men, and technicalities become harmless, or at least less dangerous.

The judge, the professional interpreter of the law, is an important part of a jury trial. There can no more be a common-law jury trial without a judge than there can without a jury. The law requires him to instruct the jury in the law of the case, and it is reversible error for him to fail to do so, or to erroneously instruct them.

[Empire Improvement Co. v. Lynch.]

Empire Improvement Co. v. Lynch.

Assault and Battery.

(Decided April 17, 1913. Rehearing denied May 8, 1913.
62 South. 16.)

1. *Appeal and Error; Harmless Error; Pleading.*—Any error in sustaining a demurrer to a plea is harmless where a substantially similar plea makes up some of the issues, especially where not supported by the evidence, and it not appearing how the ruling could have deterred the defendant from making any proof he had of the other plea.

2. *Witnesses; Examination and Cross.*—Where a plaintiff, a negro, was going to consult a physician having an office in defendant's building, had gotten into an elevator reserved for whites, and was kicked by the servant in charge of the elevator and injured, and defendant's only contention was that he had gotten into the wrong elevator, and that the servant did not discover his color until he reached the floor plaintiff wanted to disembark, it was within the discretion of the court as controlling cross examination to refuse to permit defendant to ask him what was the matter with him, and whether before that he had had a similar disease.

3. *Evidence; Judicial Notice; Effects of Disease.*—The court does not take judicial notice of the effect certain diseases will cause.

(Somerville, J., dissents in part.)

APPEAL from Birmingham City Court

Heard before Hon. C. W. FERGUSON.

Action by George Lynch, by next friend, against the Empire Improvement Company, for damages for assault and battery. Judgment for plaintiff and defendants appeal. Affirmed.

TILLMAN, BRADLEY & MORROW, and FRANK W. DOMINICK, for appellant. The court was in error in sustaining demurrer to plea 4 as an answer to counts 7 and 8. The court was also in error in its rulings on the evidence, and in refusing the charges requested by defendant, and in giving the charges requested by plaintiff.—*Peters v. So. Ry.*, 135 Ala. 537; *White & Co. v. Farris*, 124 Ala. 470.

[Empire Improvement Co. v. Lynch.]

HARSH, BEDDOW & FITTS, and W. T. HALL, for appellee. If there was error in sustaining demurrer to plea 4 it was rendered harmless as similar pleas were left in the record on which the same defenses might be made.—58 South. 1047. Besides the plea shows no manner of justification for the assault.—*B'ham R. & E. Co. v. Baird*, 130 Ala. 349. It does not matter whether the assaulted person is a passenger or not.—*Mitchell v. Gambill*, 140 Ala. 546. But he was a passenger and entitled to the highest degree of care.—*Treadwell v. Whittier*, 5 L. R. A. 502. The control of the cross examination rests largely in the discretion of the court.—8 Enc. P. & P. 109. The question called for a conclusion of the witness.—*C. of Ga. v. Clements*, 57 South. 53. There was no dispute as to the assault, and the only question as to the amount of damages, and as none of the charges given or refused affected that question, they were refused without error.

SAYRE, J.—Without so deciding, we will assume, agreeably with appellant's contention, that there was error in sustaining plaintiff's demurrer to defendant's fourth plea. The ruling, if erroneous, worked no harm to defendant. Pleas 3 and 4 sought to justify the assault alleged to have been committed on plaintiff by the operator of defendant's elevator, and the substantial matter of justification averred in each of them was the same. It was that "plaintiff became abusive and insolent in his conduct and manner towards defendant's agent in charge of the said elevator, and his said abusive and insolent conduct seriously interfered with the proper management and control of the said elevator by said servant." The further averment of plea 3 is that said servant committed the assault alleged in ejecting plaintiff from the elevator, using no more force than

[Empire Improvement Co. v. Lynch.]

was reasonably necessary, as alleged in plea 3, or, "to preserve order on said elevator and the proper management and operation of the same, attempted to quiet the plaintiff and to put an end to his said conduct, using no more force than was reasonably necessary therefor," as alleged in plea 4. In the third plea it was also alleged that plaintiff had gone into the elevator car with knowledge and in violation of defendant's rule that colored people were not allowed to ride therein, but were required to take a different elevator. Notwithstanding these differences, the substantial matter of justification was the same in each of these pleas, it was what we have above stated it to be, and there could be no expectation of prevailing on either of them unless proof were offered of that matter. But there was no testimony to sustain this substantial averment of either plea, though such proof was demanded by plea 3 on which evidence was taken. Plaintiff's witnesses concurred in stating that he used no language nor did any act whatever of the character alleged in these pleas, that the assault was committed just as plaintiff had stepped from the elevator upon the floor to which his business took him, and, in short, that his conduct was wholly inoffensive. Defendant's evidence made no better case for it in respect to the issue of an assault and its justification. Defendant's servant in charge of the elevator testified: "I told him to get off the car. There were two men went off in front of him, and he started off and went pretty slow. Then I just touched him with my foot." In the state of the case thus shown no reason can be found why the court's ruling on plea 4 should have deterred defendant from proof of the same averments in plea 3; and as matter of further fact, if that were of any concern in the determination of the principle which ought to control, it very clearly appeared that

[Empire Improvement Co. v. Lynch.]

there were no other witnesses to the transaction who might have testified differently. For these reasons we hold the alleged error harmless.—*Going v. Ala. S. & W. Co.*, 141 Ala. 546, 37 South. 784.

Plaintiff's testimony was that his private parts had been injured by the kicks he got and that his testicles were thereafter swollen. The purpose of his visit to defendant's building was to consult a physician who had his office there. Plaintiff said he had been sick. Defendant then proposed to ask the witness what was the matter with him, and whether before that he was not afflicted with a disease of the private parts. The trial judge sustained objections to the questions on the ground that their only effect was to prejudice the jury against plaintiff. Appellant charges error to these rulings on several grounds. It says it had a right to know for what purpose plaintiff went into its building and upon its elevator, to know whether he had business there or was a mere trespasser. But the undisputed testimony showed that plaintiff's presence in the building was not objected to, nor was it denied that he had a right to be lifted by one or another of the several elevators defendant operated for the convenience of its tenants and persons having business with them. The only contention was that plaintiff, a negro, had gone into an elevator reserved for whites, and the only evidence defendant offered in support of its special pleas went to prove, without express or inferable contradiction, that defendant's servant had not discovered the fact that plaintiff was a negro until the car had reached the floor of plaintiff's destination. This being the true aspect of the case, and the only one presented, the court was well within its discretion to curtail and control unnecessary cross-examination in making the rulings questioned.

[Empire Improvement Co. v. Lynch.]

Appellant contends further these questions should have been allowed on the theory that they might have reduced the damages by explaining the effects of which plaintiff complained as traceable to a different cause, and supposes our common knowledge should come to the aid of his assertion that a venereal disease will cause effects of a similar kind. The court below declined to take judicial notice according to appellant's suggestion, and we also are inclined to take that view. We do, however, assume to know that the treatment plaintiff says he received would cause the effect of which he complained, and think it reasonably clear that the proposed testimony, assuming plaintiff's answer would have confirmed appellant's suspicion, was incompetent either to justify or mitigate the assault proved without conflict, and that, at best for appellant, the questions, as framed, were calculated to elicit prejudicial admission not in necessary, nor even, so far as we know, probable, conflict with his previous testimony. If the appellant had desired to have the plaintiff say on cross-examination whether the particular condition, which he had attributed to the kicks administered by defendant's servant, had existed theretofore, or how soon it had followed, and so, or in other conceivable proper ways, had attempted to discredit the alleged causal connection between the assault and the condition, questions fairly shaped to that end should have been allowed, and we are not holding the court would have erred if it had permitted the questions actually propounded. We intend only to say that we do not perceive how the fact that plaintiff had a venereal disease made it necessary or even probable that the condition of which he subsequently complained resulted from the disease rather than from the kicks, and that, if the jury were to be allowed to speculate, they may as well have speculated

[Birmingham Railway, Light & Power Co. v. Coleman.]

without the assumed answer as with it. As the case is presented, we think the trial court's diagnosis of the situation and its prognosis of the outcome was justifiable, that the court acted within the limits of a reasonable discretion in controlling the cross-examination, and that its rulings ought not to be held for prejudicial error. Appellant says these rulings left it at the mercy of the plaintiff. They left it at the disposal of the only witnesses offered who had any knowledge of the facts and a jury qualified to weigh testimony. Our judgment is that no error is shown.

The charges require no detailed consideration. None of those assigned for error touched the subject of the measure of damages. On the uncontroverted evidence defendant's agent or servant assaulted plaintiff without justifiable cause or excuse, under circumstances which made defendant liable. The court properly so charged the jury, and a proper result was reached.

Affirmed.

ANDERSON, MCCLELLAN, MAYFIELD, and DE GRAFFENRIED, JJ., concur. SOMERVILLE, J., dissents as to the ruling on the evidence. DOWDELL, C. J., not sitting.

B'ham Ry. L. & P. Co. v. Coleman.

Assault on Passenger.

(Decided April 24, 1913. 61 South. 890.)

1. *Assault and Battery; Intent; Civil Liability.*—An intent to injure is not an essential to civil liability for an assault.

2. *Appeal and Error; Amount of Recovery; Setting Aside on.*—Where the discretion of the jury is abused by awarding excessive damages, or by awarding no damages when plaintiff is entitled thereto, such a verdict may be set aside.

[Birmingham Railway, Light & Power Co. v. Coleman.]

3. *Damages; Elements.*—The law can furnish no standard for measuring damages for physical pain and mental suffering, and must therefore, leave such compensation to the sound discretion of the triers of the facts, and yet such damages, when recoverable, are actual, and when a plaintiff is entitled thereto they must be awarded.

4. *Same; Exemplary; Jury Question.*—Exemplary damages are never recoverable as a matter of right. It being a question for the jury whether they shall be allowed at all, and if so, as to the amount, but the jury must exercise their discretion in the light of the evidence.

5. *Same; Instructions.*—The charge asserting that if the jury believed that plaintiff was entitled to recover, they might award him no more than nominal damages, if, in the exercise of a sound discretion they believed this sufficient, was calculated to confuse and mislead the jury, and was properly refused.

6. *Carriers; Passengers; Assault by Employee.*—A street railway company is civilly liable to a passenger for an assault where its conductor assaulted such passenger by presenting a pistol at him at close range, unless the conductor was free from fault in bringing on the difficulty resulting in the use of the pistol, and unless it reasonably appeared to him that it was necessary for him to present the pistol to protect his own person from a battery at the hands of a passenger; hence, the court was not in error in instructing the jury that the assault could not be justified so as to relieve the company from liability unless the conductor was free from fault in bringing on the difficulty, and unless it appeared to him reasonably, and not merely fancifully, that it was reasonably necessary to assault the passenger to protect himself or the person of another passenger, and unless the means employed were in kind and degree no more than was reasonably necessary for such protection.

7. *Same; Justification; Evidence.*—It was proper to charge that the burden of proving its plea of justification was on the street railway company, where the suit was by a passenger against such company for damages for an assault committed by its conductor.

8. *Same.*—Abusive or insulting language by a street car conductor towards a passenger is not to be justified; the passenger being entitled to at least nominal damages, and evidence that such language was brought about by the misconduct of the passenger being admissible in mitigation of damages only.

9. *Same.*—The court's instruction that if there was an unlawful assault without justification "in that sort of a case," the jury should impose punitive damages as punishment for the wrongful act, and that this was left to the jury in the exercise of its sound judgment and discretion, was not erroneous when read in connection with the whole charge; it appearing that in using the quoted words the court meant that where there was an unlawful and unjustifiable assault accompanied by wrongful, abusive and insulting language, the jury could award exemplary damages in their discretion.

10. *Same.*—Where a street car conductor unlawfully and without justification assaults a passenger, at the same time humiliating him by abusive and insulting language, the jury, in its discretion, may award exemplary damages since exemplary damages are recoverable

[Birmingham Railway, Light & Power Co. v. Coleman.]

for assaults or assaults and batteries where the wrongful act is done wantonly or maliciously, or is attended by insult, oppression, or other circumstances of aggravation.

APPEAL from Birmingham City Court.

Heard before Hon. C. W. FERGUSON.

Action by Belton W. Coleman against the Birmingham Railway, Light & Power Company for assault and battery. Judgment for plaintiff, and defendant appeals. Affirmed.

At the request of plaintiff the court gave the following charges:

"(3) The court charges you, gentlemen of the jury, that there is no justification shown by the evidence in this case for the use of any abusive language by the conductor towards the plaintiff.

"(4) The court charges you that the assault with a pistol on plaintiff by the conductor, which the undisputed evidence in this case, if you believe it, shows was committed, cannot be justified so as to relieve defendant from liability to its passenger therefor, unless you find: First, that the conductor was free from fault in bringing on the difficulty, if there was a difficulty; second, that it appeared to the conductor reasonably, and not merely fancifully, that it was reasonably necessary to assault plaintiff in order to protect his own person, or the person of another passenger, and that the means adopted by the conductor were in kind and degree no more than was reasonable for such protection, and the court charges the jury that the burden of proving its plea of justification is on the defendant."

The following charge was refused to the defendant:

"(5) If you believe from the evidence that the plaintiff is entitled to recover, you may award him no more than nominal damages, if in the exercise of the sound discretion you believe this sufficient."

[Birmingham Railway, Light & Power Co. v. Coleman.]

TILLMAN, BRADLEY & MORROW, and L. C. LEADBEATER, for appellant. The court erred in giving charge 4 requested by the plaintiff.—*State v. Blackwell*, 9 Ala. 79; *Lawson v. State*, 30 Ala. 15; *Johnson v. State*, 35 Ala. 363. The court erred in giving charge 3 requested by plaintiff.—*B. R. & E. Co. v. Baird*, 130 Ala. 334. The court erred in its oral charge as to punitive damages.—*Goolsby v. L. & N.*, 167 Ala. 122; *Lienkauf v. Morris*, 66 Ala. 406; *Snedicor v. Pope*, 143 Ala. 275; 21 How. 213; 101 N. W. 382; 60 L. R. A. 559; 39 Atl. 587; 50 S. W. 541; 77 S. W. 162; 82 N. E. 868. The court should have given charge 5 requested by defendant.—*Cox v. B. R., L. & P. Co.*, 163 Ala. 170; *A. G. S. v. Burgess*, 119 Ala. 555; *Coleman v. Pepper*, 158 Ala. 313; *B. R., L. & P. Co. v. Humphries*, 171 Ala. 291.

HARSH, BEDDOW & FITTS, for appellee. An intent is not essential to a civil liability for assault and battery.—*Chapman v. State*, 78 Ala. 464; *Carlton v. Henry*, 129 Ala. 479; *Seigel v. Long*, 169 Ala. 80. Even under a criminal prosecution as a matter of law, the conductor was guilty of an assault.—*Wilson v. State*, 99 Ala. 194. The court, therefore, was not in error in giving charge 4 requested by plaintiff. The same is true as to charge 3. When read in connection with other parts of the charge, the oral charge of the court complained of is not erroneous.—*Hair v. Little*, 28 Ala. 247; *S. & N. A. R. R. Co. v. McLendon*, 63 Ala. 274; *Day v. Woodward*, 13 How. 364; 26 N. W. 85; *B. R., L. & P. Co. v. Lee*, 153 Ala. 386. The court was not in error as to the measure of damages.—*B. R., L. & P. Co. v. Humphries*, 171 Ala. 291; *Hair v. Little, supra*; *So. Ry. v. Cothran*, 42 South. 101.

DE GRAFFENRIED, J.—Belton W. Coleman brought this suit against the Birmingham Railway, Light &

[Birmingham Railway, Light & Power Co. v. Coleman.]

Power Company, which operates a line of street cars in the city of Birmingham, to recover damages which said Coleman claims he sustained on account of certain abusive language which it is alleged was used towards him, and on account of an alleged assault with a pistol which was made upon him by a conductor of said Birmingham Railway, Light & Power Company while said Coleman was a passenger on one of its street cars.

There were two counts to the complaint. The first count charged the abusive language, and the second count charged the assault with the pistol.

There was the plea of the general issue, and also a special plea. This special plea, the appellant contends, was filed to both counts. The special plea was treated by the court below, and, as we read the plea, was properly treated by the court below as a plea to the second count *only*.

1. The facts show, beyond doubt, that appellant's conductor *did* present a pistol at close range at the appellee, and they also show that when he did so he applied certainly one abusive epithet to appellee.

In *civil*, as distinguished from *criminal*, actions, an *intent to injure* is not essential to the liability of the person committing the assault.—*Carlton v. Henry*, 129 Ala. 479, 39 South. 924; *McGee v. State*, 4 Ala. App. 54, 58 South. 1008. "In fact, we think that at times courts have fallen into error in applying, or in attempting to apply, the rules applicable only to *civil* actions for assaults and batteries or trespass to the person to the facts in criminal prosecutions."—*McGee v. State*, *supra*; *Thomason v. Gray*, 82 Ala. 291, 3 South. 38; *Chapman v. State*, 78 Ala. 463, 56 Am. Rep. 42.

Under the evidence of the conductor in this case (and his evidence was the most favorable evidence which was introduced on behalf of the appellant), the conductor

[Birmingham Railway, Light & Power Co. v. Coleman.]

committed an assault upon the appellee for which the appellant is civilly liable unless the conductor was free from fault in bringing on the difficulty or trouble which resulted in his presenting his pistol at the appellee and unless, also, at the time he so presented the pistol, it reasonably appeared to the conductor that it was necessary for him to do so to protect his own person from a battery at the hands of appellee.

In the case of *Birmingham Railway & Electric Company v. Baird*, 130 Ala. 334, 30 South. 456, 54 L. R. A. 752, 89 Am. St. Rep. 43, this court, referring to the right of a conductor in charge of a passenger train of a common carrier to assault a passenger on such train, said: "He cannot assault a passenger in retaliation for an assault committed upon himself or upon another passenger, and a fortiori he cannot assault a passenger for abusive words, or in revenge or punishment under any circumstances, and if he does assault a passenger *otherwise than under a necessity to defend himself* or a passenger from *battery*, or in rightfully ejecting a passenger who, by his conduct toward other passengers, has forfeited his right of carriage, the carrier is liable. The fault of the passenger short of producing a necessity to strike in self-defense will neither justify the conductor in striking nor relieve the carrier from liability for his act. Possibly such fault could be considered in mitigation of damages."—*Ala. City, G. & A. Ry. Co. v. Sampley*, 4 Ala. App. 464, 58 South. 974; *Ala. City, G. & A. Ry. Co. v. Sampley*, 169 Ala. 373, 53 South. 142.

We are therefore of the opinion that the trial court was free from error in giving charge 4 (which the reporter will set out) to the jury at the written request of appellee.

2. We know of no case in which it has ever been held that a conductor of a passenger train can *justify* the

[Birmingham Railway, Light & Power Co. v. Coleman.]

use of abusive or insulting language towards a passenger. If a conductor abuses or insults a passenger, the circumstances surrounding the occurrence may be shown, and, if such abuse or insult was brought about by the misconduct of the passenger, then the jury may consider *that* in mitigation of damages, but certainly such passenger would be entitled to recover at least nominal damages.—*Lampkin v. Louisville & Nashville Railroad Company*, 106 Ala. 287, 17 South. 448. The trial court was therefore free from error in giving charge 3 (which the reporter will set out) to the jury at the written request of appellee.

3. The appellant assigns as error the following excerpt from the oral charge of the court: “* * * And if there was an unlawful assault committed on the plaintiff here and that was without justification on the part of the conductor, why, in that sort of a case, you could impose what the law calls punitive damages; that is, damages that undertake to punish the wrongful act. That is left to your sound judgment and discretion.” This portion of the charge must, to be understood, be read in connection with what the court said *immediately* preceding it, and we think that it is evident that, when so read, the court intended to say to the jury, and did in fact say to the jury, by the use of the above words, “*in that sort of a case*,” that if there was an unlawful and unjustifiable assault committed by the conductor upon appellee, accompanied with *wrongful, abusive, and insulting language*, applied at the time of the assault by the conductor to appellee, then that under the law the jury in their discretion were authorized to award appellee exemplary damages. The oral charge of the court may be somewhat involved, but it is, as a whole, entitled to a fair and reasonable construction at our hands, and the above excerpt from the charge, read in

[Birmingham Railway, Light & Power Co. v. Coleman.]

connection with the rest of the charge which explains it and forms a part of it, was a simple statement to the jury that if the conductor unlawfully and without justification assaulted the appellee, and if, at the time he did so, he humiliated appellee by applying abusive and insulting language to him, then the jury were authorized to award exemplary damages to appellee within their discretion. The trial court cannot be put in error for making the above statement to the jury in the connection in which it was made.—13 Cyc. p. 105, sub. ix; *Wilkinson v. Searcy*, 76 Ala. 176; *Lienkauf & Strauss v. Morris*, 66 Ala. 406; *Willis v. Miller* (C. C.) 29 Fed. 238. In civil actions for damages for assaults and batteries or for assaults, exemplary damages are recoverable whenever the “wrongful act was done wantonly or maliciously or was attended with insult, oppression, or other circumstances of aggravation.”—13 Cyc. 1108.

4. While the law cannot furnish a standard for the admeasurement of damages for physical pain and mental suffering in money, and for that reason must leave such compensation to the sound discretion of the jury, who, under the evidence, when such damages are recoverable, are to allow the party so suffering such sum as they deem just, not in excess of the amount sued for, nevertheless such damages, when recoverable are actual damages in the same sense that damages for the loss of an eye, an arm, or a foot are actual damages. If, in such a case, the discretion of the jury is abused and the jury award the plaintiff excessive damages, or on the other hand, abusing their discretion, award the plaintiff *no* damages, such verdict may be set aside by the court. When a plaintiff is entitled to *actual* damages, the jury *must* award them. The *amount* of such actual damages, subject to the above control of the court, is, when compensation is to be awarded for mental pain

[Ex Parte Southern Ry. Co.]

or physical suffering, or both, necessarily left to the good sense and sound discretion, under the evidence, of the jury trying the case. *Exemplary damages are never recoverable as matter of right*, and for that reason the law, in cases authorizing *their* imposition, leaves the question as to whether *they* shall be *allowed at all*, and, if so, the *amount* of such exemplary damages, not to exceed the amount sued for, to the sound discretion of the jury, who must exercise that discretion in the light of the evidence in the case. Of course, when exemplary damages are allowed by a jury in a particular case, the trial judge may, if the verdict is so excessive as to show that the jury abused the discretion which the law committed to them, set the verdict aside.—*Montgomery & Eufaula Railway Co. v. Mallette*, 92 Ala. 209, 9 South. 363; *Seed's Case*, 115 Ala. 670, 22 South. 474.

Charge 5 was, to say the least of it, calculated to confuse and mislead the jury, and for that reason was properly refused.

There is no error in the record, and the judgment of the court below is affirmed.

Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

Ex Parte Southern Ry. Co.

Injury to Animal.

(Decided April 17, 1913. 61 South. 881.)

Railroads; Injury to Animal; Burden of Proof.—Section 5476, Code 1901, is not confined in its operations as to persons, stock, or property, to injuries sustained only at the points covered by the preceding sections.

CERTIORARI to Court of Appeals.

[Ex Parte Southern Ry. Co.]

Petition by the Southern Railway Company for certiorari to the Court of Appeals to review its judgment affirming the judgment of the trial court, reported as *So. Ry. v. Cobb*, 6 Ala. App. 459; 60 South. 426, where the charge complained of may be found set out. Certiorari denied.

LAWRENCE E. BROWN, for appellant. The appellate court was in error in holding that charge A misplaced the burden of proof, and should have held that the charge asserted a correct proposition of law.—*So. Ry. Co. v. Smith*, 50 South. 390; sec. 5476, Code 1907; *Bir. Min. R. R. Co. v. Harris*, 98 Ala. 326.

BOULDIN & WIMBERLY, for appellee. The case of *So. Ry. v. Penney*, 164 Ala. 188, is conclusive against the contention of the appellant, and the petition should be denied.

ANDERSON, J.—The Court of Appeals followed the case of *Southern R. R. Co. v. Penney*, 164 Ala. 188, 51 South. 392, as to the construction given section 5476 of the Code of 1907 as to the burden of proof. It is now insisted that this case is wrong, and is opposed by the case of *Southern R. R. Co. v. Smith*, 163 Ala. 174, 50 South. 390.

Section 5476 of the Code of 1907 is practically a re-adoption of the act of 1887, which appeared in the margin of the Code of 1886, but which said act was not embraced in the Code of 1896, and which said Code contained a section practically the same as section 1147 of the Code of 1886. In other words, when the Code of 1886 was adopted, section 1147, which changed its predecessor in the Code of 1876, was superseded by the act of 1887, and which appeared upon the foot of page

[Ex Parte Southern Ry. Co.]

300, and which said act was the last expression on the subject when the Code of 1896 was adopted; but the codifier, instead of incorporating the act as section 3443 of the Code of 1896, reproduced section 1147 of the Code of 1886, which had been repealed by the act of 1887, and which was the condition of the statute when construed in the case of *A. G. S. R. R. Co. v. Boyd*, 124 Ala. 526, 27 South. 408. The codifier of the Code of 1907, made section 5476 conform to the act of 1887, and which was construed in the case of *Birmingham Mineral Railroad Co. v. Harris*, 98 Ala. 326, 13 South. 377, wherein the cases of *Georgia Pacific R. R. Co. v. Hughes*, 87 Ala. 610, 6 South. 413, and *M. & E. R. R. Co. v. Perryman*, 91 Ala. 413, 8 South. 699, were expressly overruled. The *Harris Case* was followed in the case of *L. & N. R. R. Co. v. Davis*, 103 Ala. 661, 16 South. 10, and the act of 1887, as there construed, was placed in the present Code, and, presumably, the Legislature intended to change the statute as it appeared in the Code of 1896, and place the burden of proof on railroads of acquitting themselves of negligence for killing or injuring persons or stock, whether at places mentioned in the three preceding sections or not.

There is a manifest distinction between section 5476 of the Code of 1907 (act of 1887) and section 3443 of the Code of 1896, and the *Smith Case*, *supra*, incorrectly holds that there was no material change, and that the burden of proof was on the railroad, under the present Code, only when injury occurred at a point covered by the three preceding sections. This court had heretofore drawn a very decided distinction between the act of 1887 and section 3443 of the Code of 1896. In the *Harris* and *Davis Cases*, *supra*, it was held that the act of 1887 placed the burden upon the railroad whether the injury was or was not at a point covered by the

[Ex Parte Southern Ry. Co.]

three preceding sections, yet held in the *Boyd Case, supra*, that section 3443 of the Code of 1896 placed the burden of proof upon the railroad only as to points covered by the three preceding sections. The Legislature, presumptively aware of these interpretations, adopted the Code of 1907 with the act of 1887 reproduced as section 5476, and as construed in the *Harris* and *Davis Cases, supra*. Had no substantial change been intended, or if the Legislature meant to place the burden upon the railroads only at points covered by the three preceding sections, it would have readopted without change section 3443 of the Code of 1896, and which was construed in the *Boyd Case, supra*, as placing the burden upon the railroad only at points covered by the three preceding sections. In view of the history of this statute, and the different constructions placed upon same, as appearing in the act of 1887 and the Codes of 1876 and 1867, and in different language in the Code of 1896, it would do violence to the letter of section 5476 of the present Code, as well as the legislative intent, to hold that the change in the present Code from the section appearing in the Code of 1896 was immaterial and meant nothing. It may be true that the *Penney Case, supra*, dealt with stock, and that the *Smith Case, supra*, dealt with a person; but the statute does not warrant a distinction between persons and stock in its application. The statute makes no distinction, and deals with persons and stock in the same language and under the same conditions. It may be true that the statute, as it existed prior to the act of 1887, placed the burden on the railroad only as to stock; but said act included persons with stock, and leaves no room for making a distinction.

Regardless of the wisdom of this statute, or the constitutional objections that may be urged against it,

[Ex Parte Southern Ry. Co.]

when given so broad an interpretation, there is absolutely no escape from the conclusion that by the adoption of section 5476 of the present Code in the language of the act of 1887, which had been construed in the *Harris* and *Davis Cases*, the Legislature could not have meant that the burden of proof was placed on railroads only at points covered by the three preceding sections. We therefore hold that the case of *Southern R. R. Co. v. Penney*, 164 Ala. 188, 51 South. 392, is sound, and the case of *Southern R. R. Co. v. Smith*, 163 Ala. 174, 50 South. 390, is expressly overruled in so far as it holds that section 5476 of the present Code places the burden of proof upon railroads only at points covered by the three preceding sections. There are also expressions in the cases of *Carlisle v. A. G. S. R. R. Co.*, 166 Ala. 591, 52 South. 341, and *L. & N. R. R. Co. v. Holland*, 164 Ala. 73, 51 South. 365, 137 Am. St. Rep. 25, which indicate that the burden of proof is only upon the railroad as to points designated in the three preceding sections, and those expressions must be qualified, as they are not warranted by the letter and previous construction of section 5476 of the Code of 1907. In discussing this question, we deal with section 5476 as a mere rule of evidence, and do not think that it makes any distinction between stock and persons, or is confined to injuries at points covered by the three preceding sections. We are, of course, aware of the fact that in the practical application of said statute there may be a distinction between stock and persons, as one can be, and the other is not, deemed a trespasser. Nor do we mean to hold that the statute enlarges the care owing a trespasser, or that it increases the liability to them, or that it changes the rule of pleading, so as to relieve the plaintiff from averring that he is not a trespasser when charging only simple initial negligence.—*L. & N. R. R.*

[B'ham Ry. L. & P. Co. v. Nicholas.]

Co. v. Holland, 164 Ala. 73, 51 South. 365, 137 Am. St. Rep. 25. What we do hold is that this statute does make a change from what the law was in the Code of 1896, and as so changed is not confined in its operation to persons, stock, or property as to injuries sustained only at points covered by the three preceding sections, as was held in the *Smith Case*, *supra*.

MCCLELLAN, SOMERVILLE, and DE GRAFFENRIED, JJ., concur in the opinion and the conclusion. MAYFIELD and SAYRE, JJ., concur in the conclusion only. They think that this and the *Penney Case* can be differentiated from the *Smith Case*, and that there is no necessity for overruling said *Smith Case*. DOWDELL, C. J., not sitting.

B'ham Ry. L. & P. Co. v. Nicholas.

Injury to Person on Track.

(Decided February 13, 1913. 61 South. 361.)

1. *Pleading; Separate Causes of Action.*—A plaintiff may join two or more causes of action in the same complaint, but not in the same count.

2. *Same.*—A plaintiff cannot join in a single count in an uncertain manner two or more distinct causes of action in order to hit some possible cause of action that he may be able to prove at the trial, as a defendant has the right to be informed of the particular cause of action for which he is sought to be held liable.

3. *Same; Form; Alternative Allegations.*—Alternative allegations are allowable where each alternative of itself states a good cause of action or ground of defense, but this rule does not allow the statement in pleading of material allegations in the alternative which are inconsistent with each other.

4. *Same; Alternative and Disjunctive.*—Counts of a complainant against a street railway company for personal injury which leave it uncertain whether the plaintiff was a passenger, or merely entitled to the care and protection as a passenger; whether a trespasser or licensee; whether at the station as a passenger, or only near it with

[B'ham Ry. L. & P. Co. v. Nicholas.]

the intention of becoming a passenger; whether on the track when injured or only near the track, and if only near, how near; whether near enough to the track to be struck by a car, or only near enough to be frightened and caused to fall, was subject to special demurrer because of alternative and disjunctive averments.

5. *Same*.—Material allegations in a count alleged in the alternative or disjunctive, some of which do not state a good cause of action, rendered the count bad under the rule that pleading in the alternative is no stronger than its weakest alternative, and if one of the alternatives fails to state a cause of action, the pleading fails.

6. *Same; Persons Near Track*.—A count for personal injuries by wanton negligence, if it alleged that plaintiff was on a public street or thoroughfare, was rendered bad, by the additional averment "or other crossing," since it was possible, under such allegation, that plaintiff was on a way or place not used by the public, and so was a trespasser.

7. *Same*.—The use of the word "near" relating to dangerous agencies, if accompanied by the qualifying word "negligently" or "dangerously," with averments of knowledge of the danger on account of the proximity, is good pleading; but when used alone with "at, on, or under," a dangerous agency, it is bad as an alternative, for to say that a person is on a railroad crossing implies a dangerous place, but that he is at or near such crossing does not necessarily imply a dangerous place, since he may be a distance of from one to fifty feet.

8. *Same; Proof and Variance; Place*.—To avoid a possible variance between the allegations of proof of place, the pleader should allege different places in different counts, and not by disjunctive or alternative averments in the same count.

9. *Same; Conclusions*.—The count alleging that plaintiff was at a certain time at or near defendant's station, where there was a public street, thoroughfare or crossing, and that defendant's motorman, knowing of her peril, negligently and wantonly ran a car over the crossing, and against or so near plaintiff that she was knocked or caused to fall into a culvert, states a mere conclusion, and was not good as a count for wanton injury.

10. *Same; Definition*.—Pleading is nothing more than affirming or denying in an orderly and proper manner the facts which constitute the ground of plaintiff's cause of action, and of a defendant's defense.

11. *Same; Construction*.—A pleading will always be construed most strongly against the pleader.

12. *Street Railways; Rights of Pedestrian; Crossing Track*.—All persons have a right to cross a railway track at a proper crossing, or otherwise, but they have no right to loiter thereon nor use the track as a pathway longitudinally, unless the track is laid at grade in a public highway so as to form a part thereof.

13. *Same; Complaint; Negating Trespass*.—A count averring that plaintiff was near defendant's station for the purpose of taking passage on one of its cars, and was struck by one of its cars, running at a speed prohibited by the city ordinance, but which does not attempt to allege that plaintiff was crossing the track, or was in a

[B'ham Ry. L. & P. Co. v. Nicholas.]

public highway, falls to negative the fact that plaintiff was walking along or loitering upon the track, or attempted to board the car while it was in motion at a high rate of speed, and hence, shows that plaintiff was a trespasser under the rule of construing pleading against the pleader.

14. *Same; Persons Near Track; Showing Negligence.*—A count averring that the point at which plaintiff was injured was where a public thoroughfare or other crossing crossed its track, and that plaintiff was standing at the crossing, and that defendant's car was negligently run so close to her as to cause her to fall into a culvert, but which does not allege that she was rightfully at that place, falls to show any breach of duty owing plaintiff by defendant.

APPEAL from Bessemer City Court.

Heard before Hon. J. C. B. GWIN.

Action by Lucinda Nicholas against the Birmingham Railway, Light & Power Company for damages for personal injury. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The following are the counts of the complaint referred to in the opinion:

"(4) Plaintiff claims of defendant \$10,000 as damages for that heretofore, on, to wit, August 2, 1911, defendant was a common carrier of passengers for hire and reward, operating electric cars for such purpose in Jefferson county, Ala. And plaintiff avers that at the time aforesaid in, to wit, the town of Brighton, a municipal corporation, in said county and state, she was at or near a regular station or stopping place of defendant, where defendant's cars were accustomed to stop for the purpose of taking on and letting off passengers, and that she was at or near such station for the purpose of taking passage on one of defendant's cars. And plaintiff avers that there was at said time a valid ordinance of the said town of Brighton, making it unlawful for cars to run within the corporate limits of said town at a greater rate of speed than six miles per hour, and that at the said time and place, which was within the corporate limits of the said town of

[B'ham Ry. L. & P. Co. v. Nicholas.]

Brighton, one of defendant's cars was running at a greater rate of speed than six miles per hour in violation of said ordinance, and that as a proximate consequence of such greater speed than six miles per hour of the said car the plaintiff was run into and knocked down by the same, and as a proximate consequence received great personal injuries, suffered great physical pain and mental anguish to her damage aforesaid, and was put to great expense for doctor's services and medicines, and was permanently made less able to work and earn a livelihood to her damage as aforesaid, for which she sues."

(7) Same as 4 down to and including "Jefferson county, Ala.," and adds: "And plaintiff avers that she was at the time and place aforesaid at or near the defendant's car track at or near East Brighton station on defendant's line at a point where a public street or thoroughfare or crossing of said town, which was constantly used by a large number of people in passing to and fro at this point, crossed the same, and the plaintiff says that the motorman in charge of said car knew of plaintiff's position of peril, yet notwithstanding such knowledge, ran the said car with wanton negligence at a high and dangerous rate of speed over the said crossing, and against or so near to the plaintiff that she was knocked or thereby caused to fall into a ditch or culvert, as a proximate consequence of which she received great personal injuries, suffered physical pain and mental anguish, was made sick and sore, put to great expense for doctor's services and medicines, and nurse's hire in and about the curing and care of her said injuries, and was permanently disabled and disfigured, all as a proximate consequence of the wanton negligence of the motorman in charge of said car as aforesaid."

[B'ham Ry. L. & P. Co. v. Nicholas.]

“(8) Plaintiff claims of defendant \$10,000 damages for that heretofore, on, to wit, the 2d day of August, 1911, the defendant was a common carrier of passengers for hire and reward, operating cars propelled by electricity for such purpose in the town of Brighton, a municipal corporation, in Jefferson county, state of Alabama. And plaintiff says that at the time and place aforesaid she was standing at or near the defendant's car track at or near East Brighton on defendant's line at a point where a public thoroughfare or street or other crossing crossed the said track, and that said thoroughfare or street or crossing was constantly and continuously used by a large number of people passing to and fro across the said track at said point. And plaintiff avers that, while she was so standing at the said time and place, the defendant negligently ran one of its cars against or so near to the plaintiff at said street, or thoroughfare, or crossing, at a high and dangerous rate of speed, that plaintiff was thereby knocked or caused to fall into a culvert or ditch, as a proximate consequence of which she received great personal injuries, has suffered great physical and mental anguish, and was disabled for a long time from working and earning money, and has been permanently made less able to work and earn money, was made sick and sore, and has been put to great expense for doctor's services, medicines, nurse's hire, and proper diet, all as a proximate consequence of the negligence of the defendant in negligently running its said car against or near the plaintiff at a high and dangerous rate of speed at said crossing aforesaid, for which she sues.”

TILLMAN, BRADLEY & MORROW, and FRANK M. DOMINICK, for appellant. The court erred in overruling demurrers to count 4 of the amended complaint.—*L. & N.*

[B'ham Ry. L. & P. Co. v. Nicholas.]

v. Holland, 164 Ala. 73; *Ensley R. Co. v. Chewning*, 93 Ala. 25; *B. R., L. & P. Co. v. Fox*, 56 South. 1013; *Rice v. So. Ry.*, 56 South. 587; *Simerman v. Hill C. C. Co.*, 54 South. 426; *N. B'ham Ry. Co. v. Liddicoat*, 99 Ala. 545; *B. R., L. & P. Co. v. McGinty*, 158 Ala. 410; *G. & A. U. Ry. Co. v. Julian*, 133 Ala. 371; *Montgomery v. A. G. S.*, 97 Ala. 305; *Elwell's Case*, 144 Ala. 317; *Jones' Case*, 153 Ala. 160; *A. G. S. v. Godfrey*, 156 Ala. 220, and cases there cited. Count 7 was also subject to the demurrer interposed.—*Gordon v. T. C. I. & R. R. Co.*, 164 Ala. 203; *B. R., L. & P. Co. v. Fox*, *supra*; *Herren v. Tuscaloosa W. W. Co.*, 40 South. 55; *B. R., L. & P. Co. v. Brown*, 150 Ala. 327; *Neyman v. A. G. S.*, 55 South. 509; *So. Ry. v. Prather*, 119 Ala. 588; *L. & N. v. Mitchell*, 134 Ala. 265; *C. of Ga. v. Freeman*, 134 Ala. 354; *So. Ry. v. Weatherlow*, 153 Ala. 172; *So. Ry. v. Stewart*, 164 Ala. 171, and authorities *supra*. On these same authorities, count 8 must be held bad. The court erred in sustaining demurrers to the pleas of contributory negligence.—*So. Ry. v. Weatherlow*, *supra*. The oral charge of the court was error.—*L. & N. v. Calvert*, 54 South. 184; *So. Ry. v. Stewart*, *supra*.

GOODWYN & ROSS, for appellee. The court properly overruled demurrers to count 4.—*Ala. C. C. & I. Co. v. Cowden*, 56 South. 984; *L. & N. v. Holland*, 55 South. 1001; *Ensley Ry. Co. v. Chewning*, 9 South. 458. Count 7 was not subject to the demurrers interposed.—*A. G. S. v. Williams*, 37 South. 255; *Ga. Pac. v. Ross*, 14 South. 282; *L. & N. v. Calvert*, 54 South. 184; *Pos. Tel. Co. v. Jones*, 133 Ala. 217. Count 8 was not subject to the demurrers interposed.—Authorities next above and *Armstrong v. Mont. St. Ry.*, 123 Ala. 233. There was no error in sustaining demurrer to the pleas of contributory negligence, as they were addressed to the whole

[B'ham Ry. L. & P. Co. v. Nicholas.]

complaint and some of the counts charged wantonness.—*M. & C. R. R. Co. v. Martin*, 23 South. 231; *So. Ry. v. Weatherlow*, 44 South. 1019. The court correctly defined wanton negligence in its oral charge.—*M. & C. R. R. Co. v. Martin*, *supra*; s. c. 30 South. 827; *C. of Ga. v. Foshee*, 125 Ala. 199. The court properly instructed that the burden was upon defendant to prove its special plea.—*McFarland v. Dawson*, 125 Ala. 433; 16 Cyc. 928. Counsel discuss other refused charges, in the light of the above authorities, and insist that the court was without error in its action thereon.

MAYFIELD, J.—Appellee sued appellant to recover damages for personal injuries. The wrongful act alleged is that appellant's motorman ran a car against or so near to plaintiff that she was knocked, or thereby caused to fall, into a ditch or culvert. In two counts the wrong was alleged to be due to simple negligence, and in the other it is denominated wantonness.

The place of the injury—that is, the locus in quo—is alleged to be at or near East Brighton station, on defendant's car line, at or near the defendant's car line, at a point where a public street or thoroughfare crossed the same. In one count (count 4) it is alleged that plaintiff was at this point for the purpose of taking passage on one of defendant's cars. In the other counts it is not alleged for what purpose plaintiff was at this point. In no count is it alleged that plaintiff was on the track or in dangerous proximity thereto, except inferentially, according to an alternative that the car struck her. According to the other alternative, she may have been at safe distance from the track, but, on account of fright was caused to fall into the ditch or culvert. In none of the counts is it made certain whether plaintiff was walking along or near to the defendant's

[B'ham Ry. L. & P. Co. v. Nicholas.]

car track, or whether she was crossing it, or whether she was traveling along the public street or thoroughfare, or whether she was merely crossing such street or thoroughfare, or whether she was standing still, or was loitering on or at the crossing of the street car track and the street or thoroughfare. It is not made to appear whether the street car track is laid along so as to form a part of the street or thoroughfare, or whether it merely crosses the street or thoroughfare. While it is alleged that there is a crossing of the street car track and the street, it is not alleged whether the crossing is at grade, or above or below grade. In other words, it is left wholly to conjecture whether the plaintiff was a trespasser on or near the defendant's track at the time of the injury. The allegations to show this fact are extremely indefinite and uncertain. Some of the alternative allegations, standing alone, clearly show that she was a trespasser at the time of the injury, while others leave it in doubt whether she was a trespasser or was rightfully at the place where she was injured.—Mr. Gould, Pleading, § 51, p. 80, says: "An important requisite in all pleading is certainty. This requisite implies that the matter pleaded must be clearly and distinctly stated, so that it may be fully understood by the adverse party, the counsel, the jury, and the judges, and especially (as regards the declaration) that the defendant may be enabled to plead the judgment, which may be rendered in the cause, in bar of any subsequent action for the same cause; for if a vague or partial description of the matter in controversy, in a given case, were allowed, and in a subsequent suit of the same thing the declaration should contain a full and precise description of it, the cause of action, though actually the same in both cases, would not appear from a comparison of the two records to be so."

[B'ham Ry. L. & P. Co. v. Nicholas.]

The object and purpose of good pleading is to disclose, and not to conceal, the real issue to be tried. The rules of pleading are to be tested, as well as dictated, by good sense and sound logic. The science of pleading is only a means for obtaining the ends of justice. Attempts to evade or conceal the real issue, or attempts to stifle justice in the webs of form, each merits no more countenance than the underlying rules of law compel the court to accord. It would be a deplorable condition of the law of pleading if the plaintiff could file a count or a complaint good against all proper or appropriate grounds of demurrer, yet leaving it impossible for the defendant or the court to know of what particular wrong or injury the plaintiff complains. While a plaintiff, under our system of pleading, may join two or more causes of action in several separate counts, he cannot so join them in one count. A plaintiff is not allowed, against an appropriate demurrer, in a single count, to allege in a doubtful and uncertain manner two or more distinct and incongruous causes of action, in order to hit some possible cause of action that he may be able to prove on the trial. The defendant has the right to be informed of the particular cause of action for which he is sought to be held liable in each count.

At common law alternative averments were not allowed in civil or criminal cases, and some courts held that the error was not cured by a verdict. But a different rule has long prevailed in this state; in fact, we have a statute expressly allowing certain alternative averments in indictments.—Cr. Code, §§ 7149-7152. A similar rule of pleading in civil cases has been allowed, when each alternative, of itself, states a good cause of action or ground of defense; but the rule has never been extended in this state so as to allow the statement of material allegations in the alternative, which are in-

[B'ham Ry. L. & P. Co. v. Nicholas.]

consistent each with the other—that is, to allow one alternative to state one cause of action, and the other to state an entirely different cause of action. In *Dusenberry's Case*, 94 Ala. 418, 419, 10 South. 274, 276, it is said: "Alternative averments of matters of substance are destructive of all certainty in the formation of definite issues for trial. The prime object of the successive steps in pleading under our system is to evolve such issues so that they may be presented pointedly and distinctly. * * * Under our system, 'all pleadings must be as brief as is consistent with perspicuity, and the presentation of the facts, or matter to be put in issue, in an intelligible form; no objection can be allowed for defect of form, if the facts are so presented that a material issue in law or fact can be taken by the adverse party thereon.'—Code, § 2664. It cannot be said of a complaint that it is perspicuous, or that it presents the facts in an intelligible form, so that a material issue may be taken thereon by the defendant, unless it contains a clear and distinct statement of the facts which constitute the cause of action, so that they may be understood by the party who is to answer them, by the jury, who are to ascertain the truth of the allegations, and by the court, who is to give judgment.—1 Chitty on Pleading (16th Am. Ed.) 256. * * *

When the plaintiff, in a single count, shifts his right of action from one ground to another, and states several breaches of duty in the alternative, or disjunctively, so that it is impossible to say upon which of several equally substantive averments he relies for the maintenance of his action, then there is such confusion and obscurity as to the ground upon which a recovery is claimed that the defendant is not clearly informed of the matter to be put in issue; and a count so substantially variant and contradictory in its allegations is demurrable.

[B'ham Ry. L. & P. Co. v. Nicholas.]

Dusenberry's Case has been explained, if not qualified, to this extent. In *Mothershed's Case*, 97 Ala. 265, 12 South. 718, it is said: "It is argued that under the rule declared in *Highland Avenue & Belt R. R. Co. v. Dusenberry*, 94 Ala. 413, 10 South. 274, that the complaint and each count thereof was defective, and that the court erred in overruling the demurrer. There may be some expressions in the *Dusenberry Case* which apparently sustain this contention, but regard must be had to the character of the complaint then under consideration. The pleader had united in the same count causes of action arising under different subdivisions of section 2590, and some of the averments were made disjunctively. It was not held that where the several causes averred and relied upon for a recovery arose under the same subdivision were stated separately, but not disjunctively, and each averment contained a substantive cause of action, such a count was demurrable. A count of this character fully informs the defendant that each substantive averment is relied upon, and he may prepare his defense accordingly. Proof of either will authorize a recovery." In *McNamara v. Logan*, 100 Ala. 194, 14 South. 177, it is said: "The complaint is not offensive to the principles declared in *H. A. & B. R. R. Co. v. Dusenberry*, 94 Ala. 413 [10 South. 274]. * * * There is no conjunctive or disjunctive averment of several causes of action in one count, but the averment of one cause of action—the negligence of the defendants whereby defects producing the injury existed in their ways, works, machinery, and plant."

In *Hughes' Case*, 144 Ala. 608, 609, 42 South. 39, 40, it is said: "While, under our system of pleading as well as under the common law, counts for distinct and independent torts of the same nature, and upon all of which the same judgment was to be given, could be join-

[B'ham Ry. L. & P. Co. v. Nicholas.]

ed in separate counts in the same action, there is no law permitting the plaintiff to unite in one count several torts constituting distinct and separate causes of action.—*A. G. S. R. R. Co. v. Shahan*, 116 Ala. 302 [22 South. 509]; *L. & N. R. R. Co. v. Cofer*, 110 Ala. 491, 18 South. 110; *Railroad Co. v. Dusenberry*, 94 Ala. 413 [10 South. 274]; *Offield v. Wabash R. R. Co.*, 22 Mo. App. 607; *S. A. & M. Ry. v. Buford*, 106 Ala. 303 [17 South. 395].” In *Bunt's Case*, 131 Ala. 591, 594, 32 South. 507, 508, it is said: “The fifth count as originally framed was demurred to and demurrer confessed, and thereupon it was amended, and, as amended, it averred that ‘the engineer of said engine wantonly or intentionally caused or allowed said engine to propel said car against said other car with too great force, with *knowledge or notice* [*Italics are ours*] that plaintiff was between said cars and in great danger from said car being propelled against said other car with such force.’ The averment in this count in the alternative ‘with knowledge or notice’ rendered it bad as counting on wantonness.” The following quotation was adopted and followed in *Gray's Case*, 154 Ala. 200, 45 South. 299: “Inextricable confusion of issues would result from the blending in one count of a number of distinct breaches of duty as independent grounds of recovery, to be chosen from and relied on at the election of the plaintiff.” In the case of *L. & N. R. R. Co. v. Duncan & Orr*, 137 Ala. 454, 34 South. 990, it is said that: “We are of opinion that the complaint does not state any cause of action. Its alternative averment of the existence of one, or, if not that one, then the other, and vice versa of two entirely distinct and different causes of action against the defendant in distinct and different capacities, is not the affirmative averment of either of the causes of action referred to; and it cannot be said to

[B'ham Ry. L. & P. Co. v. Nicholas.]

aver any cause of action whatever.—*Southern Railway Co. v. Bunt*, 131 Ala. 591 [32 South. 507]; *Central of Georgia Railway Co. v. Freeman*, 134 Ala. 354, 32 South. 778; *Tinney v. Central of Georgia Ry. Co.*, 129 Ala. 523 [30 South. 623]; *Southern Railway Co. v. Shelton*, 136 Ala. 191 [34 South. 194]. No cause of action being averred, the judgment must be reversed.—Code, § 3333.”

In the case of *Porter v. Hermann*, 8 Cal. 619, 623, 624, Field, C. J., later Justice of the Supreme Court of the United States, said: “The allegation of the complaint is that the money was ‘collected and received by the defendant as the agent, or attorney in fact, of the plaintiff.’ This is, in substance, an allegation that the defendant collected the money as agent, or, if he did not collect it as agent, then he collected it as attorney in fact. If the defendant can be charged in this alternative form, he may with the same propriety be charged in the disjunctive form with the collection of the money in every character and capacity specified, thus: That the defendant was in possession of the money collected and received by him as the attorney or factor, or broker, or agent, or clerk of the plaintiff, or in some other fiduciary capacity. Under no system of pleading would such alternative or disjunctive allegations be permitted. Stephen, in his Treatise on Pleading, lays down as rules that: ‘Pleadings must not be insensible, nor repugnant, nor ambiguous, nor doubtful in meaning, nor argumentative, nor in the alternative, nor by way of recital, but must be positive in their form.’—Pages 377, 388. Van Santvoord, in his Treatise on Pleading, under the Code of New York, says: “It was also and still is a rule that pleadings must not be either alternative or hypothetical, as where it was charged that the defendant wrote and published, or caused to be written and published,

[B'ham Ry. L. & P. Co. v. Nicholas.]

a certain libel. This was held bad for uncertainty.'—Page 200."

Mr. Gould (Pleading, p. 14) says that: "Pleading is, practically, nothing more than affirming or denying in a formal and orderly manner, those facts which constitute the ground of the plaintiff's demand and of the defendant's defense. Pleading, therefore, consists merely in alleging matter of fact, or in denying what is alleged as such by the adverse party. But in the theory or science of pleading the averment of facts on either side always presupposes some principle, or rule of law, applicable to the facts alleged, and which, when taken in connection with those facts, is claimed by the party pleading them to operate in his own favor; for all rights of action, and all special defenses, result from matter of fact and matter of law combined. And hence in every declaration, and in all special pleading, some legal proposition (i. e., some proposition consisting of matter of law), though not in general expressed in terms by the pleader (because the court is supposed judicially to know it), is always and necessarily implied, or, to use the language of grammarians, understood."

These fundamental rules of pleading find application when applied to counts 4, 7, and 8 of this complaint, and the objection was taken by appropriate special demurrer. Each count of this complaint is very indefinite, uncertain, on account of the alternative and disjunctive averments. It is uncertain whether the plaintiff was a passenger, or entitled to the care and protection of a passenger, or whether a trespasser or a licensee. It is uncertain whether she was at the station as a passenger, or whether she was only near there with the intention of later becoming a passenger, or, if near the station with such intention, how near or how far. It is

[B'ham Ry. L. & P. Co. v. Nicholas.]

also uncertain whether she was on the track when injured, or when the wrongs complained of were committed, or was only near the track, and, if only near, how near or how far therefrom. It is likewise uncertain whether she was near enough the track to be struck by the car, or whether only near enough to be frightened and caused to fall. The rights of passengers and the rights of trespassers, as against common carriers, are not the same, but quite different. The duties and liabilities of common carriers to passengers and those to trespassers are likewise very different. Again, the rights and duties of persons rightfully on a railroad track are different from the rights and duties of those wrongfully thereon and who are thereby trespassers; and the duties and liabilities of the railroad company are likewise different as to each class.

All persons have the right to cross a railroad track, but they have no right to loiter thereon, nor use the track as a passway longitudinally, unless the track is laid at grade, so as to form a part of the public highway. So the duties and liabilities of railroad companies are different as to those who are rightfully crossing its track and to those who are wrongfully walking along it, or even loitering on or wrongfully using it at a public crossing.

These principles of law have been so frequently announced by this court that it is useless to cite the cases.

So many material allegations in counts 4 and 8 are alleged in the alternative or by disjunctive averments—and some of the alternatives not stating good causes of action—that it renders them subject to the demurrer interposed. The rule in this state on this subject is well expressed as follows: "The count being in the alternative, and in this way attempting to present two causes of action in the same count, it is the well established

[B'ham Ry. L. & P. Co. v. Nicholas.]

rule that both alternatives must present a cause of action, or the count will be held to be bad. In other words, in such case the count can be no stronger than its weakest alternative, and, if one of the alternatives fails to present a cause of action, the count will be held to be bad.—4 Ency. Pl. & Pr. 620; *Central of Ga. Ry. Co. v. Freeman*, 134 Ala. 354, 32 South. 778." *Sloss-Sheffield Steel & Iron Co. v. Sharp*, 156 Ala. 288, 47 South. 280.

One of these alternatives of count 4 would make this case only that plaintiff was near defendant's station for the purpose of taking passage on one of its cars, and was run into by one of its cars. This, it will be seen, in no wise negatives the fact that plaintiff was a trespasser on the track, and alleges only simple negligence, as for the violation of a municipal ordinance. There is no attempt to allege that plaintiff in this case was crossing the track, or that she was in a public highway; but for aught that appears she was walking along, or loitering upon, the defendant's track, or attempted to board the car while the same was in motion at this high rate of speed, in violation of the ordinance. Construing the count against the pleader, as we must do, it shows that plaintiff was a trespasser, and therefore does not state a good cause of action.—*Chewning's Case*, 93 Ala. 27, 9 South. 458.

One of the alternatives of the eighth count would make this case only that plaintiff was near East Brighton station, and near defendant's car track, and that defendant's car was negligently run close to her, and caused her to fall into a ditch or culvert. It therefore wholly fails to show any breach of duty owing the plaintiff. While it is alleged in this count that "the point at which plaintiff was injured was where a public thoroughfare or street or other crossing crossed said track," it is not alleged that plaintiff was rightfully

[B'ham Ry. L. & P. Co. v. Nicholas.]

there—that is, that she was traveling the street or thoroughfare and was crossing the track—but the count affirmatively alleges that she was “standing at this crossing.”

While a pedestrian has the right to cross a railroad track at a public crossing, he has no right to stand upon or obstruct it or to loiter there. In *Mizzell's Case*, 132 Ala. 506, 31 South. 86, the plaintiff was struck by the tender of a backing engine going at the rate of 25 miles per hour, and was so struck while he was walking along the side of the track, as he testified, at a road crossing; yet the court held that, in the absence of wantonness, willfulness, or subsequent negligence there was no liability, although he was on the crossing. In that case the court, by McClellan, C. J., said: “It is settled in this state that persons have the right to cross a railroad track, at least when it is not fenced, wherever they have occasion to be beyond it. Of course, the duty of exercising care must be observed. But no person has a right to use the track of a railroad as a road or path, and if a person is injured by a passing engine or train while walking on the track, or on the ends of the crossties by the side of the track, he cannot recover damages therefor, unless the trainmen willfully or wantonly ran against him, or unless they failed to exercise due care to avoid striking him after they became aware of his peril, and such failure contributed to the injury.”

If the count could otherwise be justified on the ground that plaintiff was in or traveling along a public street or thoroughfare, it would be rendered bad by the use of the last alternative—“or other crossing.” In other words, it is possible that, if plaintiff was in a public highway, she might not be a trespasser, but if she was in a way, running along and across the car track, which was not public and was used only by trespassers, no

[B'ham Ry. L. & P. Co. v. Nicholas.]

matter how often or how frequently, she would still be a trespasser. The error in pleadings of using a general or comprehensive term in the alternative, preceded by the phrase "or other," was at an early date pointed out by this court, even where the very words of the statute were used. In *Raiford's Case*, 7 Port. 104, the statute "prohibited the sale, in quantities less than a quart, of rum, brandy, whisky, tafia, or *other spirituous liquor*." Raiford was indicted for selling "*spirituous liquors*" without specifying the kind of liquor. This court held the indictment bad. "In pleading it is not enough to aver the existence of such *other acts or means* in the language of the statute; but the pleader must, in addition to the statutory, generic phrase, specify the acts or means under a *videlicet*. Example: Under our former statute against retailing, if the pleader wished to proceed for the sale of ardent spirits other than "rum, brandy, whisky, or tafia"—these being all the kinds specified in the statute—he should have averred that the defendant sold spirituous liquors, to wit, gin, etc., or words of similar import." *Johnson v. State*, 32 Ala. 585. In the case just quoted from the defendant was indicted for obstructing a public road "by a fence bar, or other impediment." The court held that the use of the phrase "or other impediment," though it was the exact language used in the statute, was bad, notwithstanding the statute expressly allowed alternative averments as to the means by which an offense was committed.

The use of the word "near," as related to dangerous agencies, has been several times considered by this court. It has been held to be bad as an alternative, when used alone with "at," "on," or "under" a dangerous agency, such as a falling roof or wall or falling rocks, etc.; but if accompanied with the qualifying word "dangerously"

[B'ham Ry. L. & P. Co. v. Nicholas.]

or "negligently," with averments of knowledge of the danger, on account of the proximity, it has been held to be good. See *Simmerman's Case*, 170 Ala. 553, 54 South. 426; *Merriweather's Case*, 161 Ala. 441, 49 South. 916; *Mills' Case*, 149 Ala. 474, 42 South. 1019; *Black's Case*, 178 Ala. 531, 59 South. 497. The correctness of these rulings is, we think, well illustrated by this case. "On" a railroad crossing is, of course, a dangerous place; but "at" or "near" such crossing or track is not necessarily dangerous. It all depends upon how near the track one is, as to whether he is within the zone of danger or that of safety. A point one foot from a railroad track or from a public street which crosses the track may be said to be either "at" or "near" the crossing. A point 50 feet from the railroad track or from the public street would likewise be at or near, or certainly near, the crossing, yet one would be dangerously near a passing car, while the other would not be. A person in 1 foot of a car track is within the danger zone of passing cars, while one 50 feet from the track is not, but is within the safety zone. To say that a person is "at or near" a railroad station or "at or near" its track, without more, does not show that such person is within the danger zone of passing trains, or that those in charge of passing trains or cars owe him any duty.

An examination of the evidence makes it quite obvious why the pleader in this case resorted to the general alternative in averments as to the position and location of plaintiff, relative to the track and station of the defendant, when injured. It was to avoid a probable variance between the allegations and the proof. This should have been done by alleging the different positions in different counts, and not by alleging them in general, indefinite, and uncertain alternatives and dis-

[B'ham Ry. L. & P. Co. v. Nicholas.]

junctive averments in the same count. The rules of law and pleading as to certainty are intended to prevent this very practice resorted to in this case.

The seventh count was treated by the pleader and by the trial court as stating a cause of action as for wantonness. Its sufficiency as a count of this character was properly tested by appropriate demurrer, and sustained by the trial court. In this ruling there was manifest error. The count is not good as a wanton count under the rules laid down by this court, in that it does not show, except as by a mere conclusion of the pleader, that the plaintiff was in a position of peril, or that the motorman knew of her peril. The facts upon which the conclusion is based are set out, and they do not support the conclusion of the pleader. As before stated, a person near a street car station or track is in a perilous situation or not, according to his proximity to the track, and according to whether he sees, or can see, approaching or passing cars. This doctrine was early announced by this court in *Tanner's Case*, 60 Ala. 621, 642, and has been many times followed. In that case Mr. Tanner was riding along the track. The court said: "Unlike animals, often found on railroad tracks, Mr. Tanner was an intelligent human being, knew the speed and momentum of railroad trains, and should have got off the track. Doubtless he intended to do so. He possibly miscalculated his ability to reach the crossing just ahead of him. The persons in charge of the train, perceiving by his movements that Mr. Tanner knew of their approach, were justified in supposing he would leave the track before they would come up with him. The testimony, in which there is no material conflict on this question, shows that there were points at which he could have done so with safety. The law does not require that trains shall be stopped, or checked up, when

[B'ham Ry. L. & P. Co. v. Nicholas.]

persons of discreet years are seen on the track, unless, from their position or movements, or other cause, it can be inferred that they are not apprised of the approaching danger, or, from some other cause, they are unable to leave the track. Such requirements of railroads would greatly impede their business, and would do them a great wrong." The rule is different, of course, as to infants of tender years and as to persons who are disabled by infirmity from getting out of the way, or who are unconscious of their danger; but neither of those cases is before us, and we are not attempting to state the law in such cases.

Counts somewhat similar to the one now under consideration were considered and passed upon in the following cases, and in each case held not to state a cause of action as for wantonness: *Martin's Case*, 163 Ala. 215, 218, 50 South. 897; *Brown's Case*, 121 Ala. 221; *Mitchell's Case*, 134 Ala. 261, 32 South. 735; *Haley's Case*, 113 Ala. 640, 21 South. 357; *Stewart v. Southern Ry. Co.*, 179 Ala. 304, 60 South. 927; *Anchors' Case*, 114 Ala. 492, 22 South. 279, 62 Am. St. Rep. 116, which reviews the cases up to that time. This count does not allege that the injury was willfully or wantonly inflicted, as it might have done, but it attempts to set forth the facts upon which the wantonness is based, and the facts alleged do not show wanton or willful injury. Everything alleged show, at best, only simple negligence. You cannot change a given fact by calling it harsh names or by gratuitously adding violent expletives or epithets to its real name. While we cannot look to the evidence for the purpose of construing the pleadings, yet as these three counts were held good by the trial court, and because of the generality and alternative and disjunctive averments of these counts, the flood-gates were opened as to the admission of the evidence,

[B'ham Ry. L. & P. Co. v. Wilcox.]

and all of the evidence, even that of the plaintiff alone, shows that, if plaintiff had been required to state her cause of action as for wantonness with reasonable certainty, there would have been a variance. On account of the uncertain, alternative, and disjunctive averments in the complaint, there was no variance, because there was evidence tending to support some one or more of these various alternatives, although the particular alternative averment was not good.

It therefore follows that the trial court erred in overruling the demurrers as to each of these three counts; and for this error the judgment is reversed and the cause is remanded.

Reversed and remanded.

ANDERSON, McCLELLAN, SOMERVILLE, and DE GRAFFENRIED, JJ., concur. DOWDELL, C. J., dissents as to counts 4 and 7.

B'ham Ry. L. & P. Co. v. Wilcox.

Damage for Injury to Passenger.

(Decided April 17, 1913. 61 South. 908.)

1. *Carriers; Passengers; Complaint; Negligence.*—Where the complaint charged that plaintiff took passage on one of defendant's cars and paid her fare thereon, and that when she reached her destination the car stopped, but just before she arose from her seat it moved forward with a jerk, and she was thrown violently against a seat and injured, and that the injury proximately resulted from the negligent way in which defendant conducted itself in and about carrying her to her destination; and a count alleging the same state of facts with the allegation that the injuries were due to the negligent way in which defendant handled a car on which plaintiff's wife was riding, neither count was demurrable on the ground that the general averment of negligence was overcome by the particular facts stated.

2. *Negligence; Complaint; General and Specific Averments.*—A complaint for injuries which charges negligence generally is suffi-

[B'ham Ry. L. & P. Co. v. Wilcox.]

cient, unless it contains language limiting the general averments to acts or omissions described in the count which do not justify the general conclusion of negligence.

3. *Pleading; Construction.*—Where the first count of the complaint after stating the relation of the parties, alleged that as plaintiff arose from her seat in defendant's street car preparatory to alighting she was thrown violently against a seat by the negligence of defendant in suddenly moving the car forward with a jerk; and counts 2 and 3 were similar except that they charged the injury to be the proximate consequence of the negligent way in which defendant conducted itself in and about her carriage, concluding with the words "as aforesaid," such words should not be construed as referring the general averments of negligence to the particular facts previously alleged in the counts, but rather to the averred destination of the passenger in counts 2 and 3, and to the relation of plaintiff's wife to the defendant as averred in count 1.

APPEAL from Jefferson Circuit Court.

Heard before Hon. J. J. CURTIS.

Action by J. R. Wilcox against the Birmingham Railway, Light & Power Company for damages for injury to his wife while a passenger. Judgment for plaintiff, and defendant appeals. Affirmed.

Count 1: "Plaintiff claims of defendant the sum of \$15,000 damages, for that, heretofore, to wit, on the 16th day of August, 1910, the defendant was engaged in operating a street car line in the city of Birmingham, it being at such time a common carrier of passengers for hire, and on said date plaintiff's wife, Mattie E. Wilcox, desiring to go to her home, which was near Eleventh avenue and Twelfth street, took passage on one of defendant's cars, paying her fare thereon. And plaintiff avers that when the car upon which she, the said Mattie E. Wilcox, was riding, reached the point at which she was to get off at Eleventh avenue and Twelfth street, the same was stopped, but just before the plaintiff's wife arose from her seat preparatory to alighting from said car, the same was caused to move with a jerk, and plaintiff was thrown violently against a seat in said car, or some other object. (Here follows catalogue of injuries, and allegations of damages resulting there-

[B'ham Ry. L. & P. Co. v. Wilcox.]

from.) And plaintiff avers that the said injuries and damages were caused by reason of, and as a proximate consequence of, the negligent way in which the defendant conducted itself in and about carrying plaintiff's wife to her point of destination." Count 2 is similar in all respects to count 1, except that it alleges that the injuries and damages were caused by reason of, and as a proximate consequence of, the negligent way in which the defendant conducted itself in and about the handling of its car on which plaintiff was riding to her point of destination. Count 3 is practically a duplicate of count 2. Count A states the same facts as the other counts in shorter form and alleges the negligence to be the negligent manner in which defendant conducted itself in and about handling its said car upon which his wife was traveling.

TILLMAN, BRADLEY & MORROW, and CHARLES E. RICE, for appellant. The court erred in overruling demurrer to the first count of the complaint.—*Johnson v. B. R., L. & P. Co.*, 149 Ala. 533; *B'ham O. & M. Co. v. Grover*, 48 South. 684; *B. R., L. & P. Co. v. Weathers*, 164 Ala. 32; *B. R., L. & P. Co. v. Parker*, 136 Ala. 251. On these authorities, the demurrers to counts 2 and 3 should have been sustained. Counsel discuss the charges given and refused in the light of these authorities, and insists that the rulings were erroneous.

FRANK S. WHITE & SONS, for appellee. The judgment entry does not disclose any rulings of the court as are set up in the assignment of error, and therefore, this question is not presented for review.—*Ala. Chem. Co. v. Niles*, 106 Ala. 302. In any event, the first count was not subject to the demurrers interposed.—*B. R., L. & P. Co. v. Harris*, 165 Ala. 483; *Same v. Selhorst*, 165 Ala.

[B'ham Ry. L. & P. Co. v. Wilcox.]

477; *Haggard's Case*, 155 Ala. 344; *Oden's Case*, 164 Ala. 21; *Adams' Case*, 164 Ala. 270; *C. of Ga. v. Carlton*, 163 Ala. 64; *B. R., L. & P. Co. v. Jordan*, 54 South. 280; *Same v. Gonazles* in MSS. On these same authorities, counts 2, 3 and A were good. There was no error in refusing the affirmative charge.—*Peters v. So. Ry.*, 135 Ala. 537; *Bessemer Foundry Co. v. Tillman*, 138 Ala. 162.

MCCLELLAN, J.—The only assignments of error insisted upon in brief relate to the action of the court in overruling demurrers to counts 1, 2, 3, and A. The action is by the husband for injuries received by the wife while a passenger on the car of the appellant.

The argument, common to all of the counts, for error in the action stated, is rested upon the familiar rule announced in *Johnson v. B. R., L. & P. Co.*, 149 Ala. 533, 43 South. 33; *B. O. & M. Co. v. Grover*, 159 Ala. 276, 48 South. 682; *B. R., L. & P. Co. v. Parker*, 156 Ala. 251, 47 South. 138; *B. R., L. & P. Co. v. Weathers*, 164 Ala. 32, 51 South. 303 (among others to like effect), that a general averment of negligence (where permissible) is restricted, in its effect, to the particular facts alleged as affording the basis or bases for the negligence so generally charged; and, if the particular facts alleged do not justify the conclusion of negligence therefrom, the count is demurrable.

None of the counts here under view are subjects of the application of that rule. Aside from matters of inducement and of averment of relation between the party injured and the defendant, counts charging negligence may, and very often do, contain two distinct features, viz.: (a) One descriptive of the *means* of injury and of the physical circumstances surrounding and attending the injury, and (b) another, ascribing *the* injury to

[B'ham Ry. L. & P. Co. v. Wilcox.]

negligence for which the defendant is responsible. Unless, as was ruled in the *Parker Case*, *supra*, there is language in a count which constricts, contracts, the general averment of negligence to acts or omission described in the count, but which does not justify the conclusion of negligence so sought to be drawn by the pleader in general, though referable, terms, the stated first feature (lettered "a") does not contract the general averment of negligence, for the obvious reason that the former only describes the *means* of injury and the physical circumstances surrounding and attending the injury, and not the culpable act or omission of defendant or of the defendant's servants, which the law terms "*negligence*." It was so soundly decided in *B. R., L. & P. Co. v. Jordan*, 170 Ala. 530, 54 South. 280. In many recent decisions here similar counts have not been found subject to the rule asserted by the demurrant in this instance.

It is also urged for appellant that the words "as aforesaid," concluding all the counts but that numbered 1, should be accorded the effect to refer the general averment of negligence to the particular facts previously alleged in the counts, as was the process in the *Weathers Case*, *supra*. A comparison of the count so interpreted in the *Parker Case* and those here under view readily discloses that the words "aforesaid," in these counts, do not refer to the general averment of negligence, but to the passenger's destination as averred in counts 2 and 3, and to the relation (of passenger) which the plaintiff's wife, when injured, bore to the defendant as averred in count A. Count 1 does not contain the words "as aforesaid."

No error appearing, the judgment is affirmed.

Affirmed. All the Justices concur; DOWDELL, C. J., not sitting.

[B'ham Ry. L. & P. Co. v. Goldstein.]

B'ham Ry. L. & P. Co. v. Goldstein.

Injury to Passenger.

(Decided February 13, 1913. 61 South. 281.)

1. *Pleadings; Necessity of Allegation; Construction.*—Where the action was for injury to a passenger caused by a collision of the street car on which he was riding, with a railroad train, a complaint charging the relation of the parties, the collision and the injury, and averring that "said servant or agent in charge or control of said car, acting within the line and scope of his authority as such, wantonly or intentionally," etc., was not rendered uncertain in the use of the word "said," although no servant or agent had been mentioned before in the complaint, the word being superfluous and capable of being omitted because of a want of an antecedent to which it could refer.

2. *Carriers; Passengers; Injuries; Name of Servant or Agent.*—The matter of the name of the servant in charge of a car is best known to the defendant corporation, and the passenger is not presumed to have knowledge on this point; hence, the complaint in an action for damages to a passenger which alleges that the injury was wantonly or willfully inflicted by the agents or servants of defendant, who were in charge of the car, and while acting within the scope of their authority was not insufficient because it failed to give the names of the agents or servants or to state definitely whether it was the motorman or conductor who caused the injury.

3. *Damages; Passengers; Pleading.*—An allegation in the complaint that plaintiff "was crippled and disfigured, and a bump was caused to be upon his head" is sufficient to sustain a verdict for damages as for permanent injury, as it is not necessary that it be alleged in terms that the injuries were permanent.

4. *Charge of Court; Weight and Sufficiency of Evidence.*—A charge asserting that plaintiff could not recover damages, "if, after a careful consideration of all the evidence, any of the individual jurors is reasonably satisfied from any material part of the evidence that he ought not to recover," was not improperly refused, where the main question litigated was as to the kind and amount of damages rather than the right to recover it all; hence, the charge in this case was calculated to mislead the jury, although unanimity is essential to a verdict.

APPEAL from Birmingham City Court.

Heard before Hon. H. A. SHARPE.

Action by Joe Goldstein against the Birmingham Railway, Light & Power Company. Judgment for plaintiff, and defendant appeals. Affirmed.

[B'ham Ry. L. & P. Co. v. Goldstein.]

The facts and pleading are sufficiently set out in the opinion. The following is the charge referred to: "The plaintiff cannot recover damages in this case, if, after a careful consideration of all the evidence, any of the individual jurors are reasonably satisfied from any material part of the evidence that he ought not to recover."

TILLMAN, BRADLEY & MORROW, and E. L. ALL, for appellant. The averments of the count were vague and uncertain, and the demurrers should have been sustained.—*B. R., L. & P. Co. v. Weathers*, 51 South. 303; *A. B. & A. v. Wood*, 49 South. 427; *Scott v. Rawls*, 48 South. 710; *Crawford v. Ingram*, 47 South. 712; *Wes. Assur. Co. v. McGlathery*, 115 Ala. 213. The defendant was entitled to have the jury instructed that under the pleadings plaintiff was not entitled for permanent injuries as none were alleged. The court erred in refusing to give charge 8, requested by defendant.—*B. R., L. & P. Co. v. Moore*, 148 Ala. 128; *Mitchell v. State*, 129 Ala. 23; *Carter v. State*, 103 Ala. 93; *Grimes v. State*, 105 Ala. 86.

HARSH, BEDDOW & FITTS, for appellee. There is nothing substantial or meritorious in the demurrer.—*David v. David*, 66 Ala. 148; 31 Cyc. 73; 20 Minn. 418; 9 Johns. 317; sec. 5340, Code 1907; *Morgan v. Shepherd*, 156 Ala. 404; *So. Ry. v. Weatherlow*, 164 Ala. 151; *Mobile E. Co. v. Sanges*, 169 Ala. 341. The complaint was sufficient to sustain the verdict for permanent injury.—*B. R., L. & P. Co. v. Brown*, 150 Ala. 331; 29 L. R. A. 287, and cases cited. There was no error in refusing charge 8, as it was both confusing and misleading under the circumstances in the case.—1 Mayf. 171.

MAYFIELD, J.—Plaintiff, appellee here, was a passenger on defendant's street car line, and was injured

[B'ham Ry. L. & P. Co. v. Goldstein.]

in consequence of a collision of the car in which he was being carried, with a train of a commercial railroad, at a crossing of the two lines.

The first count of the complaint was for simple negligence, and set up the relation of passenger and carrier, and alleged the collision and injury in consequence thereof. The negligence alleged was of that approved general type held good in such cases, "in and about the carrying of plaintiff as a passenger."

The second count was for wanton or willful injury, and adopted the first count, as to the relation of the parties, the collision, and the injury, and concluded as follows: "Plaintiff avers that *said* servant or agent in charge or control of said car acting within the line and scope of his authority, as such, wantonly, or intentionally caused or allowed said collision, well knowing that so to do would likely or probably cause great personal injury." Demurrers were interposed and overruled as to this last count, and this ruling is the error first insisted upon for a reversal. It is contended by appellant that the use of the word "*said*" in the quoted part of the count rendered the count bad for uncertainty. It is insisted that the word "*said*" is a relative word or adjective, and must be referred to the "servant or agent" before mentioned; and that as no agent or servant had been mentioned before, in the complaint, it had nothing to which it could relate, and therefore the use of it rendered the count bad.

We cannot agree to this contention. We think this count is certain to "a common intent," and this is all that is required of good pleading. If different servants or agents had been mentioned in the preceding parts of the count or complaint, then the use of the word "*said*" might have rendered the count indefinite as to which of these different servants or agents wantonly or willful-

[B'ham Ry. L. & P. Co. v. Goldstein.]

ly inflicted the injury; but, as none had been mentioned or referred to, the word "said" is purely superfluous, and may and must be omitted, because there is no antecedent to which it can refer.

It is, however, alleged in terms that the injury was wantonly or willfully inflicted by the agents and servants of the defendant, who were in charge or control of the car in which plaintiff was being carried as a passenger, and while acting within the line and scope of their authority; and this is sufficient in an action by a passenger, who is not presumed to know the names of these agents or servants. It does not seem to us that there is any opportunity or occasion for this allegation to deceive or mislead, or to lure the court or the defendant into any doubt as to the party or parties who committed the particular wrong complained of. It is true that their names are not given, and it is not certain whether it was the motorman or the conductor who wantonly or willfully caused the collision and the injury complained of; but this is matter best known to the defendant and is knowledge which the passenger is not presumed to have, and for these reasons we think the count was not subject to the demurrer interposed, nor to the objection insisted upon in argument.

It would have been reversible error for the trial court to have charged the jury in this case *ex mero motu*, or at the request in writing by the defendant, that the jury could not "award the plaintiff any damages on account of any permanent injuries." It is conceded by the appellant that there was proof tending to show permanent injury, but it is claimed that there were no *allegata* to support the proof.

We cannot yield assent to this argument. It is alleged in the complaint that plaintiff was "crippled and disfigured and a bump was caused to be upon his head."

[B'ham Ry. L. & P. Co. v. Goldstein.]

This allegation we hold to be sufficient to justify and sustain a verdict for damages as for permanent injuries. It is not necessary that it be alleged in terms that the injury was permanent. The injury alleged may be of such character as to impute or imply that it is permanent.

It cannot be doubted that it is the law of this state that a verdict or finding of a jury must be unanimous. Nor can it be doubted (because it is a corollary of the above proposition) that, if any one juror finally disagrees with the others touching which party the verdict should be in favor of, no verdict can be rendered for either party and a mistrial is the result. In civil or criminal cases, unanimity of the jury is essential to a verdict.—*Pickens v. State*, 115 Ala. 42, 52, 22 South. 551; *Carter v. State*, 103 Ala. 93, 15 South. 893. Charges which assert the above proposition, and this only, should be given; but if the charge may be said to assert this proposition, yet, as applied to the particular case on trial, it possesses misleading tendencies, it is properly refused.

In the case of *Hale v. State*, 122 Ala. 85, 26 South. 236, the charge intended to assert this proposition of law as applicable to criminal cases was as follows: "If any individual juror is not convinced of defendant's guilt beyond all reasonable doubt and to a moral certainty, the jury cannot convict." In commenting on this charge and the proposition of law involved, the court, speaking through McClellan, C. J., said: Several charges asked by defendant bearing a similitude to charge 7 refused by the circuit court to this defendant have recently been brought under review in this court. Some of them have been held bad and others good, depending upon whether the particular charge under consideration asserted simply and only that the defendant

[B'ham Ry. L. & P. Co. v. Goldstein.]

should not be convicted so long as any one of the jurors had a reasonable doubt of his guilt. If it was clear to this intent, and did not tend to mislead the jury to an *acquittal* upon a reasonable doubt of one or any number of the jurors less than the whole number, nor to inculcate the idea that the conclusion of each juror should be reached and adhered to 'without the aid of that consideration and deliberation with his fellows which the law intends shall take place in the jury room,' nor to render each juror the keeper of the consciences of his fellows, nor involve other misleading tendencies, the charge has been held to be good, and if it went beyond this it has been disapproved.—*Carter, et al. v. State*, 103 Ala. 93, 15 South. 893; *Goldsmith v. State*, 105 Ala. 8, 16 South. 933; *Pickens v. State*, 115 Ala. 42, 22 South. 551; *Cunningham v. State*, 117 Ala. 59, 66, 23 South. 693; *Lewis v. State*, 120 Ala. 339, 25 South. 43. These cases show the line of demarcation between good and bad charges of this general nature, and upon them it is clear that charge 7 refused to this defendant is of the former class, and should have been given."

In the case of *Birmingham Railway, Light & Power Co. v. Moore*, 148 Ala. 128, 42 South. 1029, a charge (numbered 5) almost identical with charge 8 in this case was by this court held to be a good charge, and its refusal to be reversible error. We quote from that opinion: "Charge 5, refused to defendant, was in this language: 'The plaintiff cannot recover damages in this case if, after a fair consideration of all the evidence, any individual juror is reasonably satisfied by any material part of the evidence that she ought not to recover damages.' Under the rule as laid down in the case of *Hale v. State*, 122 Ala. 85, 26 South. 236, with respect of charge 7 that was refused to the defendant in that case, and in the case of *Mitchell v. State*, 129

[B'ham Ry. L. & P. Co. v. Goldstein.]

Ala. 23, 30. South. 348, with respect of charge 2 refused to the defendant in that case, charge 5, as above set out, must be held to assert a correct proposition of law, and its refusal constitutes reversible error."

If that ruling is to be adhered to, it must work a reversal of this case. We do not think the charges can be distinguished on the ground assigned by appellee that in *Moore's Case* the charge said "after a *fair* consideration of all the evidence," while the charge in this case says "after a *careful* consideration of all the evidence." The two words, "fair" and "careful," are in legal effect the same as used in these two charges; and each finds support in precedents of usage in similar charges.

We feel safe in saying that the use of the word *careful* in lieu of *fair* does not render the charge bad. Whatever difference there may be in their literary meaning, the legal effect of both is the same, as they are used in these two charges.

After a "careful" and "fair" examination of all the cases we have consulted on the question involved, we have reached the conclusion that it was not error to refuse charge 5 in *Moore's Case*; that the decision of this court in that case was wrong; and that it should be overruled and is overruled.

While it is very true that a plaintiff cannot recover without recovering some damages (nominal, at least), yet charges framed as are these in question are calculated to mislead the jury, when the question in the case most strongly litigated is as to the kind and amount of damages, rather than as to the right to recover at all. The proposition of law intended to be asserted by this charge—the only reason which makes it proper—is that the verdict of the jury must be unanimous; yet the charge is so worded as to confuse the question of the

[B'ham Ry. L. & P. Co. v. Goldstein.]

amount of damages which plaintiff is entitled to recover, with the question of the plaintiff's right to a verdict.

What was said in *Moore's Case* is apt here. The negligence alleged in the first count is not confined to the acts of the motorman or of the conductor, either or both; they may have observed due care, and yet this may not rebut the inference or presumption of negligence, which the law creates as to the carrier in cases like this.

Mr. Hutchinson states the rule as to the burden of proof, in cases like this, as follows: "Where * * * it is shown that an accident has happened upon a railway, from which a passenger sustained an injury, by the breakage down or the overturning of the vehicle, or by a derailment of the train or of some of the cars, or by a collision between the two trains or between two cars, or by an unusual jerk or jolt of the train, or by the parting of the train, or by the breaking down of a bridge, or by the falling of some of the appliances within the vehicle, or by an obstruction, which the carrier has placed too near the track, striking the side of the train, a *prima facie* presumption will arise that the accident was due to the negligence of the company or its servants."—*Carriers*, vol. 3, pp. 1701-1703, § 1414.

For these reasons we think the charge both in the *Moore Case*, and in this, possessed such misleading tendencies that the trial court was justified in refusing to give it. We are not prepared to say that we would reverse a case if the trial court had given the charge, upon the ground of these misleading tendencies; because the opposite party could and should, in such cases, prevent or counteract these misleading tendencies by countercharges.

This difference as to the giving and the refusing of misleading or argumentative and abstract charges has

[B'ham Ry. L. & P. Co. v. Mayo.]

been so often stated that it is needless to cite the cases in point.

Affirmed. All the Justices concur.

B'ham Ry. L. & P. Co. v. Mayo.

Injury to Passenger.

(Decided February 6, 1913. 61 South. 289.)

1. *Carriers; Passengers; Negligence; Jerking Car.*—Where a passenger was alleged to have been injured by a jerking of the car, whether or not evidence of such jerk will sustain a charge of negligence, depends on the violence of the jerk, the situation of the passenger at the time, and the duty of the carrier to know that situation.

2. *Same; Affording Opportunity to Alight.*—Where a car has stopped at a regular stopping place for letting off passengers, it was the carrier's duty, through its agents operating the car, to inform itself whether a passenger was in the act of leaving the car, and in a position that would be rendered perilous by putting the car in motion, and a failure to discharge that duty on the part of the servants or agents of defendant would be negligence rendering defendant liable.

3. *Evidence; Cumulative Evidence.*—Where the court permitted the conductor, who was in charge of the car which is alleged to have injured plaintiff, to testify that there was no unusual jerk of the car, nor any jerking after it was stopped, other than the ordinary movement of the car, after it was stopped, the defendant got all it was entitled to in the way of an opinion, and was not entitled to have the conductor answer the question, "was the stop violent enough to cause you to lose your footing on the back end?"

4. *Appcal and Error; Presumptions.*—Where an exception was taken to a part of the oral charge, and the court undertook to correct the charge, it cannot be assumed that the jury failed to properly heed the corrections thus made.

APPEAL from Jefferson Circuit Court.

Heard before Hon. A. H. ALSTON.

Action by Alice D. Mayo against the Birmingham Railway, Light & Power Company for damages to her as a passenger. Judgment for plaintiff, and defendant appeals. Affirmed.

[B'ham Ry. L. & P. Co. v. Mayo.]

The portions of the oral charge excepted to are as follows: "Now, let's see what the plaintiff has to do to make out a case. Plaintiff must reasonably satisfy you from the evidence in this case that on June 2, 1911, she was a passenger on defendant's car. That is admitted; there is no evidence controverting that at all; and that she was thrown over, received these injuries, while she was a passenger. When she does that—convince you by reasonably satisfying you from the evidence that she was a passenger upon a car that day, and while a passenger, being transported to the place where she got off, or the place she intended to get off, she received the injury—she has made out a prima facie case. The plaintiff, having discharged the burden of law put upon him to make out a prima facie case can rest there, unless the defendant can discharge the duty which rests upon it to rebut that testimony by showing that the injuries which resulted to her were the result of contributory negligence on her part, or from no negligence on the part of the company. The burden is upon the defendant, after it has been shown to your reasonable satisfaction that there has been an injury which has befallen a passenger, to show that the company was free from negligence which brought about the injury. I charge you, if the defendant's car had come to a full stop, and this plaintiff, who was a passenger, undertook to disembark, it was the duty of the defendant company to have held the car at a standstill until they knew she had alighted, safely alight, from the car, and render all facilities for her safeguard reasonably in the power of the company to have done so; and failure to have done that would create liability on the company for whatever injuries she received."

After the exception to the first part of the charge, the court said, in explanation thereof: "The burden is on

[B'ham Ry. L. & P. Co. v. Mayo.]

the plaintiff to reasonably satisfy you that she was injured while a passenger, and injured by the negligence of the company."

TILLMAN, BRADLEY & MORROW, and CHARLES E. RICE, for appellant. Defendant was entitled to the affirmative charge under the evidence.—*B. R., L. & P. Co. v. Weathers*, 164 Ala. 23; *Same v. Parker*, 156 Ala. 251; *H. A. & B. R. R. Co. v. Miller*, 120 Ala. 535. The giving away of the seat in front of plaintiff of which he had caught hold was the proximate cause of the injury, and not the jerk of the car. Defendant was entitled to have the conductor state whether the stop was violent enough to cause him to lose his footing on the back end of the car.—*B. R., L. & P. Co. v. Hayes*, 153 Ala. 178. The court was in error in the first and second parts of the oral charge excepted to.—*A. C. G. & A. v. Bullard*, 157 Ala. 621; *B. R., L. & P. Co. v. Moore*, 163 Ala. 45; *B. R., L. & P. Co. v. Jones*, 146 Ala. 277; *Huggins v. So. Ry.*, 148 Ala. 154.

GASTON & PETTUS, for appellee. Under the evidence it was a question for the jury whether or not the injury was the result of negligence caused by a sudden jerk of the car.—*B. R., L. & P. Co. v. Gonazles*, in MSS.; *H. A. & B. v. Burt*, 92 Ala. 295; *Sweet v. B. R., L. & P. Co.*, 136 Ala. 166; *B. R., L. & P. Co. v. Jung*, 161 Ala. 470; *B. R., L. & P. Co. v. Yates*, 169 Ala. 386. The question to the witness called for a mere conclusion which had been previously fully stated by him. There was no error in the court's oral charge.—Authorities above.

SAYRE, J.—Plaintiff (appellee) recovered damages for injuries shown according to the tendency of her testimony, to have been caused by a "sudden jerk" of one

[B'ham Ry. L. & P. Co. v. Mayo.]

of defendant's electric street cars upon which she was a passenger. Defendant contends that it was entitled to the general charge, on the ground that proof of a sudden jerk, with consequent injury to a passenger, did not suffice to show negligence. The contention cannot be sustained. A jerk is necessarily sudden; and, since some such irregularities of motion are necessarily incident to the management and operation of cars, we have held, in cases where the question arose on the sufficiency of the complaint, that the averment of a sudden jerk, without more, did not show negligence. But here the allegation of the complaint was of negligence generally, and the sufficiency of its proof depended upon the violence of the jerk, the situation of the passenger at the moment, and the carrier's duty to know that situation. The testimony on either part was that the car had stopped, or was just about to stop, at a street crossing, when plaintiff, who had arisen from her seat for the purpose of leaving the car, was thrown across a seat and, according to her showing, injured. It is not clear whether plaintiff was thrown by an abrupt stop of the car or by a sudden resumption of its motion forward, if that makes any difference, and the evidence is in conflict on the question of undue suddenness in either event; but the jury had the right to find with plaintiff as to these contentions. On defendant's testimony—not to mention plaintiff's—the car was at a regular stopping place for letting off passengers, and did stop. It was then defendant's duty, through its agents operating the car, to inform itself whether plaintiff was in the act of leaving the car, and so in a position which would be rendered perilous by putting the car in motion—not to mention, again, a sudden jerk or abrupt stop—and a failure to discharge that duty was negligence.—*Highland Avenue Railroad v. Burt*, 92 Ala. 291,

[B'ham Ry. L. & P. Co. v. Mayo.]

9 South. 410, 13 L. R. A. 95; *Sweet v. Birmingham Railway*, 136 Ala. 166, 33 South. 886. The question of negligence, on all the evidence, was properly submitted to the jury.

Defendant's conductor in charge was on the rear end of the car. Testifying for defendant, he was asked: "Was the stop violent enough to cause you to lose your footing on the back end?" In *Birmingham Railway v. Hayes*, 153 Ala. 178, 44 South. 1032, it was said: "A witness can testify whether a car is going slow or fast, or is stopped suddenly or gradually, or quick or slow. The witness should have been permitted to testify whether or not he was thrown forward when the car was being stopped. If he was thrown forward, it would be a circumstance tending to show that the momentum of the car was being suddenly checked, and that the stop was quick." Here the question was different. The witness was not asked to state what actually happened to him, but was asked to give an opinion, which we will assume to have been that the stop was not abrupt enough to cause him to lose his footing. The witness had sworn that plaintiff did fall, though not flat upon her back, as she deposed. He might have been allowed to testify that there was no unusually sudden stop, or even that he kept his feet; but the question seems to have been framed upon an assumption that he and the jury might properly measure the degree of care due a passenger in respect of permissible abruptness in stopping the car by reference to the conductor's powers of resistance or accommodation. He was bound to take notice of the obvious limitations of a passenger about to leave the car; and there are such patent differences between the circumstances of a conductor and a female passenger as to render a comparison between the two, in respect of the probable consequences to them

[B'ham Ry. L. & P. Co. v. Mayo.]

of a change of speed, unfair, unreliable, and misleading as a basis of judgment, and that was the effect, if not the purpose, of the question. In any event, defendant got all it was entitled to have in the way of mere opinion, when the witness was allowed to testify, as he did, that "there was no unusual jerk of the car, nor any jerking after it was stopped, other than the ordinary movement of the car after it was stopped."

There were exceptions to parts of the court's oral charge to the jury. To deal with them in detail would involve verbal criticism of such nicety as to serve no practical purpose. The reporter may set them out if he has a mind to. The court, when exceptions were taken, undertook to correct those parts of the charge which defendant thought needed correction. We cannot assume that the jury failed to properly heed the corrections. The charge must be considered as a whole. After due consideration of all its related parts, we are unable to say there was error. After correction, if not before, it did not relieve the plaintiff of her proper burden of proof of negligence. It did not predicate plaintiff's right to recover upon proof that she was injured, while a passenger, by a sudden jerk, without more. It did not assume that plaintiff had received injuries. Wherein it put upon defendant the duty to "render all facilities for her safeguard reasonably in the power of the company," we read the charge to mean only that, after the car stopped and plaintiff undertook to "disembark," defendant owed her the duty to afford her a reasonable opportunity to alight, without such movement of the car as would render her alighting dangerous. Upon the whole, the charge impresses us as containing a sound statement, as far as it goes of the applicable law, made in fair and impartial language. With the jury's determination of the facts upon conflicting

[Williams v. Lyon.]

testimony we have, of course, nothing to do. In the exceptions reserved we find no cause for reversal.

Affirmed.

DOWDELL, C. J., and MCCLELLAN and SOMERVILLE, JJ., concur.

Williams v. Lyon.

Trespass to Realty.

(Decided February 13, 1913. 61 South. 299.)

1. *Pleading; Complaint; Demurrer.*—While a plaintiff cannot frame his declaration so as to leave the character of his action uncertain, yet a complaint which states a cause of action is not subject to general grounds of demurrer if it states a cause of action.

2. *Trespass; Ownership.*—Ownership of land imputes possession so as to support an action of trespass against a mere trespasser.

3. *Same; Defenses; Adverse Possession.*—The owner of land cannot maintain an action for damages for the cutting of timber by one holding possession under an adverse claim.

4. *Adverse Possession; Evidence.*—Evidence of mere occasional trespass upon wild, unoccupied land for the purpose of removing timber is not sufficient to show adverse possession.

5. *Property; Timber; Ownership.*—The owner of land is presumed to be the owner of the timber situated thereon.

6. *Evidence; Best and Secondary.*—Where title was sought to be deraigned through an execution sale, and the execution could not be found in the files, the execution docket of the court showing an execution on the judgment against the land in question, its advertisement, sale and deed, was admissible.

7. *Same; Documentary Evidence; Judicial Record.*—Under sections 3986 and 3995, Code 1907, the execution docket of the court was admissible to show an execution and the subsequent proceedings thereon, where the execution could not be found.

8. *Same; Notoriety of Possession.*—While the notoriety of possession may be shown by hearsay testimony, adverse possession itself cannot be shown.

9. *Appeal and Error; Harmless Error; Evidence.*—Where there was no evidence of the intention of defendant to hold adversely the land from which he was charged to have cut timber, the exclusion of evidence showing color of title in defendant was harmless, if erroneous.

[Williams v. Lyon.]

APPEAL from Mobile Circuit Court.

Heard before Hon. SAMUEL B. BROWNE.

Action by Emily C. Lyon against Homer K. Williams in trespass and as a penalty for cutting trees. Judgment for plaintiff, and defendant appeals. Affirmed.

The first count is as follows: "Plaintiff claims of defendant \$500 damages for that the defendant did heretofore, without the consent of the plaintiff, on, to wit, July 1, 1910, cut down and carry away 97 pine trees from the south half of southeast quarter, section 13, township 7, range 3 west, and did also remove from said land 12 pine logs which were already down, which lands were the property of the plaintiff, to the damage of the plaintiff, as above stated." The second count was exactly like the first, except that it alleges that the lands were in the possession of the plaintiff. The third count is like the first, except that there is no allegation as to the ownership of the land, or the possession thereof, but it is alleged that the trees and logs were the property of the plaintiff. The verdict was for \$16 damages; and, on motion of plaintiff, the court filed the certificate as provided by section 3663 of the Code, to which action the defendant excepted.

It was admitted that both sides claim from a common source, one Garland M. Dees, and that the title to the land was vested in said Dees. It was admitted that certain books were the minutes of the court; and the plaintiff offered in evidence the record from minute book 25, p. 285, of the circuit court, a judgment rendered on January 17, 1882, in favor of Wollner & Co., against Garland M. Dees for \$486.32. Conrad, a witness for the plaintiff, testified that he was deputy clerk of the circuit court and had made diligent search in the records of the court and among the papers for the execution which was issued on said judgment, and had not been able to find it, where-

[Williams v. Lyon.]

upon the plaintiff offered a book shown to be the execution docket of the circuit court of Mobile county, at page 171, showing execution on the judgment previously offered, a levy on certain real estate, including the land in question, an advertisement of the same for sale, the sale thereof to William Otis, who was the highest, best, and last bidder, and the execution of a deed to said Otis.

R. PERCY ROACH, for appellant. No brief reached the Reporter.

ERVIN & MCALEER, for appellee. The general rule is that the owner of a freehold may recover for an injury which permanently depreciates his property, while a tenant, or one with a possessory right may recover for an injury of the use and enjoyment of that right.—Sedgwick on Dam., sec. 69; 31 Am. Dec. 64; 79 Am. Dec. 779. The measure of damages must be for the thing thus destroyed, and this applies to grass, crops, trees, etc.—*A. B. & A. v. Brown*, 48 South. 73; *Grisham v. Taylor*, 51 Ala. 505. The execution under which a sale was made could not be found in the files, the former custodians were all dead, and of course, the execution docket was admissible to show the facts which could have been shown by the execution.—*Baucum v. Jenkins, et al.*, 65 Ala. 266. This was necessary to support the sale of the sheriff.—*Lewis v. Georgnette*, 3 S. & P. 184; Greenl. sec. 509. The proof shows the land to have been wild, unenclosed land, and fails to show any actual possession of any one through whom defendant claims till defendant cut the tree, and the deed from Dees to Bosarge was void as to plaintiff, and hence, was not admissible as color of title. The legal title being in plaintiff the possession of the timber was in her.—*So. Ry. v. Hill*, 154 Ala. 226. No possession is shown so as to give notice of the unrecord-

[Williams v. Lyon.]

ed deed to Bosarge, this burden was on defendant, and was not borne.—*Wells v. Mtg. Co.*, 109 Ala. 446; *Christopher v. Curtis*, 57 South. 839; *Hill v. Griffin*, 119 Ala. 216; *T. C. I. & R. R. Co. v. Gardner*, 113 Ala. 601. The evidence for defendant did not make out a prima facie case of adverse possession, and the court properly instructed for plaintiff.—*Brannan v. Henry*, 57 South. 568.

MAYFIELD, J.—Each count of the complaint is a kind of hybrid. Some of the allegations are appropriate to counts to recover the statutory penalty for cutting down or destroying trees; other allegations appear as if the count was for common-law trespass to land; and still others would indicate that it was trespass in taking chattels. Neither of the counts follow strictly any of the forms given in the Code; but each contains some allegations appropriate to several of the Code forms. There was, however, no special ground of demurrer taking this point, the demurrers merely pointing out defects which would render the count bad as to one form given in the Code.

A defendant has no right to require a plaintiff to declare in any particular form of action; but he has the right to be informed as upon which particular form of action the plaintiff intends to proceed. A plaintiff has no right to so frame or form his counts as to leave it doubtful or uncertain what cause or kind of action he intends to charge against the defendant; but, if a count states a good cause of action, it is not subject to demurrer because it does not state a definite cause of action, but it may be for uncertainty or indefiniteness as to the particular action it states.

Neither count of the complaint alleges in terms that the defendant had trespassed upon the lands of the

[Williams v. Lyon.]

plaintiff, nor that he had wrongfully cut or carried away timber or trees of the plaintiff; but it is alleged that the trees and logs in question were cut and carried away from the lands of the plaintiff by the defendant, and without her consent.

It is also true that the complaint does not allege, in terms, that the plaintiff was in the possession of the lands in question; but it is alleged that she was the owner, which imputes constructive possession, nothing else appearing, and such possession is sufficient to support trespass against a mere trespasser.

Some of the counts fail to allege that the plaintiff was the owner of the timber cut and carried away, but these do allege that she was the owner of the land, and, nothing else appearing, she will be presumed to have been the owner of the trees growing thereon and of the timber lying thereon. We are not willing to say that the trial court erred in overruling the defendant's demurrer to any count, but remark, in passing, that it is a much safer practice to follow the simple forms prescribed in the Code for such actions.

We do not think that the court erred in admitting in evidence the entries in the execution docket of the circuit court. It was shown that the original execution could not be found after diligent search in the proper place. These entries were therefore certainly the next best proof of the execution under which the lands in question were sold.

In the case of *Baucum v. George*, 65 Ala. 266, it was said by this court: "To support the sale of the sheriff, it was necessary to show a judgment against Yarbrough and an execution issuing thereon.—*Lewis v. Gorguette*, 3 Stew. & P. 184. When a record or an office paper is lost or destroyed, if its former existence is satisfactorily shown, secondary evidence of its contents will be re-

[Williams v. Lyon.]

ceived. Sometimes existence and contents may be presumed, if the record is ancient; but in all cases, it is, like other documents, the subject of secondary evidence of the highest grade the party can introduce.—1 Greenl. Ev. § 509. More than 24 years had elapsed after the issue of the execution against Yarbrough, the sale by the sheriff, the execution and registration of the deed, reciting the execution, the levy, and sale. These are facts having a strong tendency to show the existence of the execution; and when the paper is not found in the office of the clerk, its proper place of deposit, a less degree of corroboratory evidence of existence and contents is necessary than if the transaction was more recent.”

What was said above is strictly applicable to this case.

Moreover, sections 3986 and 3995 of the Code make such evidence admissible. If a transcript of the record was admissible, then surely the record itself was admissible. This is one of those unfortunate cases in which the title to land is attempted to be determined in an action which is not appropriate and was not intended for that purpose. Such always lead to trouble, if not to inconsistencies. It appears from the record that the real dispute in the this case is, Who is the owner of the land described in the complaint? This is not a proper action in which to decide that question.

The record in this case shows without dispute that the lands in question were wild lands; and therefore we are not expected to find the actual, open, notorious, and visible possession thereof that we would of lands that are in cultivation, or other open use. They seem to be valuable, at least chiefly, for the timber upon them; consequently the character of the possession depends upon the character of the land and of the uses to which it is devoted by the owner.

[Williams v. Lyon.]

It is indisputably shown that one Dees was once the owner of these lands, and therefore had the constructive possession thereof. It is also shown, we think, beyond reasonable doubt, that the title of Dees passed into the plaintiff by virtue of an execution sale and deed, and that the title of those through whom the respondent claims is void as against the purchasers at the execution sale, and those who claim through them. There was no actual possession, as distinguished from constructive possession, which could support this action or maintain a defense thereto. It does appear, however, we think, indisputably, that the plaintiff was in the constructive possession of the land in question when the trespasses were committed, or when the trees and logs in question were carried away by the defendant, and that his acts were therefore wrongful in such sense as to support this action.

Adverse possession of land cannot be shown by hearsay testimony. If the possession and its continuity be otherwise shown, the notoriety thereof may be shown by such hearsay testimony; but the possession itself, or its duration, cannot be proven by such evidence.—*T. C. I. & R. R. Co. v. Linn*, 123 Ala. 112, 26 South. 25, 82 Am. St. Rep. 108. The trial court did not err in its rulings in declining to allow the defendant to prove by the declarations of third parties who was in possession of the land and who was the owner of such land.

If the defendant could have shown that he or those under whose rights he claimed were in the adverse possession of the land at the time he cut or carried away the timber, this would have been a defense to the action; but this he failed to do.

The only possession he showed was that implied from entries on the land only at the time and for the purpose of cutting and taking the timber. This, of course, with-

[Williams v. Lyon.]

out more, was not sufficient; if it was so, every trespasser upon the land could show possession sufficient to defeat the owner's action against him. Occasional acts of entry upon land, and cutting timber therefrom, are not sufficient to show possession against the true owner, and would never ripen into adverse possession against the owner. Such acts are not only not inconsistent with mere trespass upon the land, but they are the very kind of acts necessary to constitute the trespass.

Aside from the mere opinions and conclusions of some of the witnesses, the defendant was not shown to have been in the possession of the lands when the timber was cut or carried away; nor did he connect himself with any such title or possession as would justify his entry or cutting of the timber. As before stated, the legal title was shown to be in the plaintiff, which, therefore, drew to it the constructive possession sufficient to support the action, in the absence of an actual possession in another, which was not shown.

While some of the witnesses did give their opinion or conclusion that other parties than the plaintiff were in the possession, the undisputed facts show that such opinion or conclusion was erroneous, and that there was no actual possession of these lands, aside from constructive possession, such as would defeat the plaintiff's right to recover in this action. In an appropriate action, the defendant might have been able to defeat the *prima facie* title and constructive possession shown in this case, but he offered no evidence competent or sufficient to do so in this action, in which the title to the land was not put in issue.

The rules of law and evidence applicable to such actions were stated in the case of *Aldrich Mining Co. v. Pearce*, 169 Ala. 161, 52 South. 911, Ann. Cas. 1912B, 288: "The owner of the freehold cannot maintain a per-

[Williams v. Lyon.]

sonal or transitory action to recover a part of the freehold, or damages for conversion thereof, which has been converted into personalty by a severance from the freehold, if at the time of the severance he has not the actual or constructive possession of the land.—*Cooper v. Watson*, 73 Ala. 254; *Fielder v. Childs*, 73 Ala. 567; *Beatty v. Brown*, 76 Ala. 267; *Street v. Nelson*, 80 Ala. 230; *Rogers v. Brooks*, 99 Ala. 34, 11 South. 753; *Kellar v. Bullington*, 101 Ala. 270, 14 South. 466; *Stewart v. Tucker*, 106 Ala. 321, 17 South. 385.”

The *Pearce Case*, *supra*, and this case are different in this: In the one case the plaintiff had no documentary title or actual possession, but sought to prove title by adverse possession acquired by constructive possession under color of title. The defendant in that case was indisputably in the actual possession of the land in question, and was engaged in mining coal therefrom, had a mine in actual and constant operation thereon under claim of ownership. We held in that case that the plaintiff could not recover.

In this case the rights and positions of the parties are reversed. There was no actual possession of either party which will maintain or defeat the action of trespass. The plaintiff, however, does show a constructive possession which will support the action against a mere trespasser. As much as the defendant's evidence shows, or tends to show, is occasional entries upon the land for the purpose of cutting timber, which, under the evidence, were not inconsistent with the acts of a trespasser, but were, in fact, the very acts which a trespasser would commit.

If the court had admitted the deeds in evidence, which were offered by the defendant, they would have, at most, answered only as color of title, and no such actual possession was shown thereunder, or was offered to be shown, as would have defeated the legal title which was

[Williams v. Lyon.]

shown to be in the plaintiff, nor would it have shown such possession on the part of the defendant as to defeat this action. It therefore follows that if any error intervened, as to the rulings in rejection of defendant's proffered evidence, it was without injury to the defendant on this trial.

What was said by this court in the case of *Brannan v. Henry*, 175 Ala. 454, 57 South. 971, as to occasional acts of possession and ownership to show title or adverse possession, is apt in this case. It is there said: "We have considered the evidence in this case in all its bearings, and are of the opinion that the facts testified to on behalf of the appellant, whatever they may be held to show in respect of his intention to claim ownership during the period of six years, or thereabouts, they fail to show that continuity of possession without which mere intention amounts to nothing. They show, at most, only occasional disjointed acts of possession affording, in our judgment, no sufficient basis for a verdict which would divest the true owner of his title. The trial court might well have given the general affirmative charge for plaintiff, since the burden of proving title by adverse possession was upon the defendant. This conclusion eliminates all questions as to rulings assigned for error, other than those we have noticed, and the judgment will be affirmed."

The judgment of the court below in the case at bar is affirmed.

Affirmed.

DOWDELL, C. J., and ANDERSON and DE GRAFFENRIED, JJ., concur.

[Phillips v. Bradshaw.]

Phillips v. Bradshaw.*Libel and Slander.*

(Decided January 17, 1913. Rehearing denied April 23, 1913.
61 South. 909.)

1. *Libel and Slander; Privileged Communication; Statement by Officer of a Corporation.*—Where defendant as president of a corporation, while engaged in the corporation's business charged plaintiff, who was the corporation's overseer, with the larceny of certain cotton and cotton seed belonging to the corporation, the statement is none the less privileged because it concerned the business of the corporation, and not that of defendant individually.

2. *Same; Pleading; Denial of Malice.*—Where the action was for slander in charging theft against the overseer of a plantation belonging to a corporation, against the president of the corporation individually, and defendant as such president pleaded privilege and alleged that the statement was made without malice, and the words spoken in good faith, the plea was not defective because it fails to explain the fact that the communication was made in the presence of "divers others" by setting forth every fact on which defendant relied to show a reasonable occasion.

APPEAL from Russell Circuit Court.

Heard before Hon. M. SOLLIE.

Action for slander and libel by L. W. Phillips against Caldwell Bradshaw. Judgment for defendant and plaintiff appeals. Affirmed.

The following are the pleas referred to:

"(4) That on the date alleged in the complaint as the date upon which the alleged slanderous or defamatory words are alleged to have been spoken by defendant concerning plaintiff, the defendant was the president of the Birmingham Industrial Company, a corporation; that said corporation owned at said time a large tract of real estate situated in Russell county, Ala.; and that on the occasion referred to in said complaint this defendant was on a visit to said plantation in Russell county, and was at such time engaged in looking after and protecting

[Phillips v. Bradshaw.]

the interests of said corporation, of which he was president as aforesaid, by looking after the gathering in and harvesting of the crops grown or raised on said plantation during the year 1907; that at such time and for some time before and after the 30th day of November, 1907, one W. S. Prince was the employed overseer or superintendent of said plantation, and as such was the overseer or superintendent of the said Birmingham Industrial Company. And defendant further alleges that the allegations in said complaint averring that this defendant charged or stated or spoke of and concerning the plaintiff, that plaintiff 'stole 15 bales of cotton and a whole lot of seed cotton, he did not know how much, from him,' or that 'Dr. Phillips (meaning plaintiff) had stolen 15 bales of cotton and a whole lot of seed cotton, he did not know how much, from defendant,' have reference to what passed in a conversation had between said W. S. Prince, an overseer of the Birmingham Industrial Company, and this defendant, as president of the Birmingham Industrial Company, upon the occasion of this defendant's visit to said plantation in Russell county, as aforesaid; and this defendant alleges and avers that every word spoken by him on said occasion of and concerning this plaintiff to the said W. S. Prince, as aforesaid, was spoken bona fide and without malice toward plaintiff, with the view and purpose of protecting the interests of the said Birmingham Industrial Company, and to prevent the loss or waste of the crops grown on said plantation for the said year 1907. (5) That on the date alleged in the complaint as the date upon which the alleged slanderous or defamatory words are alleged to have been spoken by the defendant concerning the plaintiff, the defendant was president of the Birmingham Industrial Company, a corporation; that said corporation owned at said time a large tract of land situated in

[Phillips v. Bradshaw.]

Russell county, Ala.; and that on the occasion referred to in said complaint this defendant was on a visit to said plantation in Russell county, and was at such time engaged in looking after and protecting the interests of said corporation in and about the gathering in and harvesting of the crops grown or raised on said plantation during said year; that at such time and for some time before, and after the 30th day of November, 1907, one W. S. Prince was employed overseer, or superintendent, of said plantation, and as such was the overseer or superintendent of the said Birmingham Industrial Company. And defendant further alleges that the allegations in said complaint averring the use of slanderous or defamatory words by defendant concerning plaintiff have reference to what passed in a conversation had between said W. S. Prince, an overseer of the said Birmingham Industrial Company, and this defendant, as president of the said Birmingham Industrial Company, upon the occasion of this defendant's visit to said plantation in Russell county, as aforesaid; and this defendant alleges and avers that all was said or spoken bona fide and without malice toward the plaintiff, with the view and purpose of protecting the interest of the Birmingham Industrial Company, pertaining to the gathering in and harvesting of the crops grown and raised on said plantation for the said year 1907."

B. DEG. WADDELL, and GLENN & DE GRAFFENRIED, for appellant. The declarations charged were not privileged, and demurrers were improperly overruled to pleas 4 and 5.—*Phillips v. Bradshaw*, 167 Ala. 199; 13 Allen 242; 1 Camp. 269; 4 Eywh. 582; 23 A. & E. Enc. of Law, 47; Greenl. on Evid. sec. 236; *Lawson v. Hicks*, 38 Ala. 279; *M. & M. R. R. Co. v. Yates*, 67 Ala. 164; *Ensley v. Morse*, 9 Ala. 266; Newell on Libel & Slander, 509. As

[Phillips v. Bradshaw.]

the words imported the commission of the crime, they were actionable per se, and the presumption is that they were uttered with malice.—Authorities supra.

J. E. HENRY, and THOMAS D. SAMFORD, for appellee. The court properly overruled demurrers to pleas 4 and 5.—*Easley v. Moss*, 9 Ala. 266; *Phillips v. Bradshaw*, 167 Ala. 199; 1 Camp. 269; 13 Allen 242.

SAYRE, J.—To a complaint for slander, alleged to have been uttered in the presence and hearing of “divers persons,” appellee pleaded two pleas which appear in the record. The purpose of the pleas was to make out a case of privileged communication. The only point taken by the language of the demurrer and requiring notice is that the pleas failed to show that defendant bona fide believed the utterance necessary to the care of his property or the protection of his interest.

Some part of the argument for the demurrer, which was overruled in the court below, advances the idea that on the facts stated in the pleas Bradshaw had no confidential relation with the overseer or superintendent mentioned therein because the plantation and the overseer belonged to the Birmingham Industrial Company, not to Bradshaw as an individual; and that the alleged communication was in no sort or event privileged because it was about the business of the company. The idea is untenable. Bradshaw, acting for his company, was acting for himself also, and entitled to the same privilege as the company had it been possible for it to be corporally present and act for itself. As for this objection, the pleas stated a case within that class of cases which is conditionally privileged “where the author of the alleged mischief acted in the discharge of any public or private duty, whether legal or moral, which the ordinary exigen-

[Phillips v. Bradshaw.]

cies of society, or his own private interest, or even that of another, called upon him to perform.”—*Lawson v. Hicks*, 38 Ala. 279, 81 Am. Dec. 49.

As for the rest, the argument for appellant seems to be resolvable into this: That defendant ought to have sought some opportunity of absolute secrecy for his communication to his overseer; otherwise, his plea ought to explain the fact that the communication was made in the presence of “divers others” by the allegation of every fact upon which he relies as tending to prove a reasonable occasion therefor. If the ground of demurrer means as much as the argument assumes it to mean, which is doubtful, still it was properly overruled, for, so far as concerned its first proposition, the pleas were framed to meet, and the trial court in its ruling followed, the views expressed in *Phillips v. Bradshaw*, 167 Ala. 199, 52 South. 662, where we said, following authorities there noted, that communications by an employer to his superintendent, having reference to the protection and care of the property committed to him, are to be considered as confidential, and, if made without express malice, are not actionable, though unjust and expressed in terms which would support an action under other circumstances; that the privilege is lost if the publication be excessive, or the language used go beyond the demands of duty or interest, but that it is not defeated by the mere fact that the statements are made in the presence of others than the parties immediately interested, nor that they are intemperate; that this is a question for the decision of the jury. To this it may not be amiss to add the few words of Lord Ellenborough in *Dunman v. Bigg*, 1 Campb. 269, where the defendant had charged the plaintiff with being a rogue and a rascal. He said: “To be sure, he (defendant) could not lawfully, under color and pretense of confidential communication, destroy the

[Phillips v. Bradshaw.]

plaintiff's character and injure his credit; but it must have dangerous effects, if the communications of business are to be beset with actions for slander. In this case, the defendant seems to have been betrayed by passion into some unwarrantable expression. I will therefore not nonsuit the plaintiff; and it will be for the jury to say whether these expressions were used with a malicious intention of degrading the plaintiff, or, with good faith, to communicate facts to the surety which he was interested to know."

It is not now insisted that the burden rested upon defendant of showing that the communications complained of were tempered to the reasonable demands of duty or interest otherwise than by the averment of a confidential relation and a denial of malice in the general way adopted in the pleas. But when he comes to the second aspect of the demurrer as argued, appellant's insistence is that the pleas fail to aver facts enough to rebut the *prima facie* excess of publication shown by the complaint. It is easy to conceive situations in which an employer may be acquitted of actual malice in making to his employee verbal communications in substance the same as the utterances alleged in the complaint, though made in the presence of others; albeit that extreme caution and regard for others which men rarely exercise in ordinary affairs, if consulted, might suggest strict confidence and the use of less offensive terms. A situation of that sort may well be colored and the judgment of the jury legitimately influenced by a great number of circumstances which the defendant has a right to bring into consideration, but which he cannot state within the decent limits of a formal plea. To some extent, therefore, after showing an occasion which may fall within the qualified privilege allowed him, he may resort to the use of general terms in denial of malice. In other words, the question

[Phillips v. Bradshaw.]

of excess, under the circumstances alleged, depending upon the presence of malice vel non, malice is sufficiently denied by the averment that the words complained of were spoken in good faith and without malice.

The cases concerning the privilege of communications between attorney and client, and husband and wife, to which appellant has referred, dealt with a different question, and proceeded upon a different principle. In them evidence of communications was excluded, without any reference to whether they were slanderous or not, because they were made in strict confidence in fact and in reliance on that policy of the law which protects against disclosure because of the necessity for perfect candor in transactions between parties standing in legitimate and recognized relations of confidence. That is a privilege which is waived in the beginning if the communication is made in the presence of witnesses, and, once waived, cannot afterwards be invoked. Here no privilege is invoked as against disclosure, but the invocation is of a privilege as against responsibility in damages on account of communications which under ordinary circumstances would be slanderous, but which the law, from motives of policy, also recognizes as privileged when spoken without actual malice upon a lawful occasion.

The special replications did no more than to assert the proposition of the demurrer to the pleas. If, however, they be indulged as averring facts, there was no need for them. By the complaint, the pleas, and the general replication, all meritorious issues attempted to be raised were properly made up for submission to the jury.

We have covered the case. There was no error.

Affirmed.

DOWDELL, C. J., and McCLELLAN and SOMERVILLE, JJ., concur.

[Maxie v. Sloss-S. S. & I. Co.]

Maxie v. Sloss-S. S. & I. Co.*Injury to Servant.*

(Decided February 4, 1913. 61 South. 269.)

Master and Servant; Injury to Servant; Proof; Variance.—Where the complaint alleged that plaintiff was engaged in and about the discharge of his said duties in said mine, as mule driver, when injured by the cars running down the incline, and the proof showed that plaintiff was standing by the side of a slope, when five loaded cars passed by the slope, leaving an entry switch latch open, and that one of the men on the cars called out to plaintiff to shut the latch for him, which plaintiff was stooping down to do, when the cars broke loose and came down the incline striking him, there was a fatal variance, as the evidence showed that plaintiff was not acting within the line and scope of his duty as mule boy or driver when injured.

(Dowdell, C. J., dissents.)

APPEAL from Jefferson Circuit Court.

Heard before Hon. A. O. LANE.

Action by Joe Maxie by next friend, against the Sloss-Sheffield Steel & Iron Company, for damages for injuries as a servant or employee. Judgment for defendant and plaintiff appeals. Affirmed.

VASSAR L. ALLEN, for appellant. Counsel insists that the court was in error in sustaining demurrers to count 4.—Sec. 1035, Code 1907. The court was also in error in directing a verdict for defendant on the theory of a variance.—161 Pa. 386; 1 Leb. M. & S. sec. 291; 32 Am. Rep. 413; 57 Am. Rep. 169; 4 Thomp. on Neg. parags. 3826, 3830; 76 Tex. 350; 53 Am. Rep. 806; 7 Am. St. Rep. 542; *Ala. S. & W. Co. v. Wrenn*, 136 Ala. 486; *Tutwiler C. & I. Co. v. Enslen*, 129 Ala. 336.

TILLMAN, BRADLEY & MORROW, and CHARLES E. RICE, for appellee. Count 4 was withdrawn by plaintiff, and

[Maxie v. Sloss-S. S. & I. Co.]

hence, if any error had intervened relative thereto, it was cured and taken out of the case by the voluntary withdrawal of the said count. Counsel practically admits that appellee was entitled to have the verdict directed as to all the counts except the 5th, but insists that the evidence raised a jury issue as to that count. It is only necessary to say that the proof showed conclusively that the injury occurred at a time when plaintiff was not engaged in his duties as muleboy, and therefore, there was a variance.—6 Mayf. 104.

SOMERVILLE, J.—The fifth count of the complaint shows that plaintiff, an inexperienced boy 13 years of age, was employed by defendant in its ore mine as mule driver or mule boy; that while plaintiff “was engaged in and about the discharge of his said duties in said mine” one or more of defendant’s cars were caused or allowed to run down a rail track in the mine against plaintiff, and severely injure him. This injury is attributed to the negligence of defendant’s bank boss, one Roberts, who was authorized to employ and instruct defendant’s servants, in that he negligently failed to instruct and properly caution plaintiff as to the dangers of the place and his occupation; the allegation being that plaintiff was a child of immature mind and body, and unacquainted with the dangers attendant upon the duties assigned to him, which were of a dangerous character and in a dangerous place. On the evidence offered by plaintiff the trial court gave the general affirmative charge for defendant, as requested by it in writing.

Without undertaking to discuss or decide the question, the writer would be inclined to the view that the evidence before the trial court made out a case for plaintiff to the extent that it should have been submitted to

[Maxie v. Sloss-S. S. & I. Co.]

the jury to determine whether defendant had properly warned plaintiff of the dangers of his employment and of his surroundings, whether this failure proximately produced his injury, and whether plaintiff was guilty of contributory negligence, and whether on the whole case plaintiff was entitled to recover. But the difficulty is that the case made by the evidence is not the case made by the complaint.

The evidence shows without dispute that plaintiff was employed as mule boy, that his duty was to pull empty cars from the mouth of an entry to the head of it to be loaded by the men, and that he had nothing to do with throwing latches or switches leading from the main slope to the entries, a duty that was imposed only on the chainers or the muckers.

The evidence also shows without dispute that on the occasion of this accident plaintiff was standing by the side of the slope at one of the entries, when five loaded cars in charge of the chainers passed out from an entry and up the slope. In doing so the entry latch was left open, and one of the chainers called out to plaintiff to shut the latch for him. As plaintiff was stooping down in the performance of this service, two cars that had broken loose from the train, and were dashing down the main slope, struck and injured him. It is thus apparent that he was injured while doing something not within the line of his duty as mule boy, and this variance from the allegations of the complaint must, under our decisions, be regarded as substantial and material, and as justifying the general affirmative charge for defendant as given by the court.—*A. G. S. R. Co. v. McWhorter*, 156 Ala.269, 280, 47 South. 84. It is true that plaintiff testified that, when he was employed by the bank boss, he was told by him to go down in the mine on the second day, and "do what the men

[Maxie v. Sloss-S. S. & I. Co.]

told me to do." If we could hold, as urged by appellant's counsel, that this general instruction might be construed as subjecting plaintiff to the direction of any and all of the men in the mine, and thereby extending the field of his service beyond that of his particular employment as mule boy, still the variance would not be relieved, for the complaint specifically informs the defendant that plaintiff's mishap was suffered while in the discharge of his duties as mule boy, and not while otherwise serving by doing another servant's work at another's request.

Counsel discusses the action of the court in sustaining defendant's demurrer to count 4 of the complaint, as specified in the first assignment of error. The judgment entry shows that the fourth count was withdrawn by plaintiff, and that there was no ruling on the demurrer.

The judgment will be affirmed.

Affirmed.

ANDERSON, MCCLELLAN, MAYFIELD, and DE GRAFFENRIED, JJ., concur. SAYRE, J., concurs in the affirmance, but only on the ground that plaintiff's injury bore no proximate relation to defendant's failure to instruct him as alleged, in which view MAYFIELD and DE GRAFFENRIED, JJ., concur also. DOWDELL, C. J., dissents, and holds that plaintiff's case should have been submitted to the jury.

[Owen v. Ala. Gt. So. R. R. Co.]

Owen v. Ala. Gt. So. R. R. Co.*Injury to Servant.*

(Decided February 6, 1913. Rehearing denied April 23, 1913.
61 South. 924.)

1. *Master and Servant; Injury to Servant; Defective Tools.*—Where the action was under subdivision 1, section 3910, Code 1907, by a servant for injuries alleged to have been occasioned by a defective tool furnished him to work with, plaintiff could not recover by merely showing that the tool was defective, but must go further and show affirmatively that the defect complained of arose from, or had not been discovered or remedied by the reason of the negligence of the master, or of some one in authority in its behalf.

2. *Same.*—Where the tool by which plaintiff was injured was not originally defective, and the defect that existed causing the injuries was latent and discoverable only by practical and continued use by an operator, defendant was not negligent for a failure to discover such defect before delivering the tool to plaintiff for use.

3. *Same; Statute.*—Subdivision 1, section 3910, Code 1907, does not change the nature of the duty owed by masters to their servants to use ordinary care and diligence to furnish safe and suitable instrumentalities and appliances and ways, etc., so as not to expose servants to unnecessary perils, exercising such care and diligence as men of ordinary prudence would exercise under like circumstances.

4. *Same; Superintendence.*—In the absence of proof that it was the part of W.'s duty to procure the machines originally, or inspect them afterwards, or that he knew that the particular motor was defective, or by any practicable inspection could have discovered the defect, evidence that he was plaintiff's boss, and had charge of tools, including compressed air or motor drills, was not sufficient to show that he was engaged in superintendence in such sense as to render the master liable in furnishing the servant with a defective motor by which he was injured.

5. *Same; Incompetent Fellow Servant.*—Where the servant claimed that his injuries resulted from the negligence of an incompetent fellow servant, the burden was on plaintiff to show that the injury was the result of the act or omission of a fellow servant, that he was incompetent to perform the duty he was required to perform, and that such incompetency was known to the master or that the master could have acquired knowledge by the exercise of due diligence prior to the accident.

6. *Same.*—The evidence examined and held not sufficient to show that defendant's servant whose alleged negligence caused plaintiff's injury, was incompetent to perform the work required of him, or that, if incompetent, that defendant had knowledge or opportunity for knowing thereof.

[Owen v. Ala. Gt. So. R. R. Co.]

7. *Evidence; Experts; Competency of Employee.*—Where a particular employment required technical skill, an expert shown to have a general acquaintance with the employment, and who knows the particular services incident thereto, and has observed a particular person in the course of the employment, may testify that such person is competent or incompetent; but such opinion is not allowable except in instances where the jury cannot be assumed to understand the subject, and able to reach an intelligent conclusion of their own without expert aid.

8. *Same; Defective Machinery.*—Where a motor, which a witness found for his own use in defendant's shop the next morning after plaintiff had been injured while using a similar motor, was not shown to be the same motor that plaintiff was using when injured, such witness was not entitled to testify as to the defective condition of the motor he found.

9. *Same.*—Where a plaintiff was injured by a defective motor drill, questions to him as to whether his boss did not know that those sockets had burrs on them, etc., not being confined to the socket used by plaintiff at the time of his injury, were properly excluded.

10. *Same.*—Where a plaintiff was injured by a defective motor drill and claimed that his fellow servant was incompetent, and that the injury resulted on account of such incompetence, a question as to what the fellow servant's duty was about cutting off air when directed, was immaterial; as it was asked prior to the introduction of any evidence that such fellow servant was incompetent.

11. *Same; Hearsay; Declaration by Foreman.*—What a foreman of plaintiff told a witness after a plaintiff had been injured as to the place where plaintiff was working when injured, was hearsay and inadmissible.

12. *Trial; Exclusion of Evidence; Offer of Proof.*—Where the record does not disclose the evidence expected to be elicited by the questions, the court will not be put in error for sustaining objections to such questions.

APPEAL from Birmingham City Court.

Heard before Hon. CHARLES A. SENN.

Action by William C. Owen against the Alabama Great Southern Railway Company, for damages suffered while in its employ. Judgment for defendant, and plaintiff appeals. Affirmed.

While in the service of the defendant company as a boiler maker, plaintiff was injured by having his gloved hand caught in a drilling machine, which was at the time being used by himself and under his exclusive control. The mode and circumstances of the injury were substantially as follows: Plaintiff was drilling out stay

[Owen v. Ala. Gt. So. R. R. Co.]

bolts in a boiler with an air motor drill attached to a motor with a reversible shut-off valve, so that the power could be shut off by the operator at the motor. The air was conveyed to the motor by a hose from a post 20 or 25 feet distant, and the power could also be shut off from this hose at the post. The motor weighed about 40 pounds, and after the boring out of each bolt it was moved about 4 inches to the next bolt. While this was being done it was customary for the operator to shut off the motor air valve. Plaintiff was furnished with a helper, subject entirely to his orders, whose duty it was to aid in setting up the motor, and to cut off the air at the post, always under plaintiff's direction or order. Plaintiff went to work with his machine about 8:30 a. m., and used it continually until about 12 m., at which time the accident happened. In reversible motors, the shut-off valve or appliance is effective when set at the center, and turning it in either direction turns on the power. When new, these shut-offs worked perfectly, but after being in use for a while most all of them get so they will occasionally fail to entirely stop the motor, due to a slight leak in the valve, and sometimes caused by the presence of grit. This is likely to occur from one to five or six times in the course of a single day's work. Plaintiff had used this shut-off between 30 and 100 times that morning, and it had failed to stop the motor two or three times. Just before his injury he had set the valve at the center for the purpose of stopping the motor, but it had failed to stop it completely, and the drill was still slowly revolving. He proceeded to move the machine to the next bolt, and while so doing either the drill or the socket caught the glove on his hand. He called to his negro helper, "Cut off the air," or "Go cut off the air.". The helper was standing at plaintiff's back about 25 feet from the air

[Owen v. Ala. Gt. So. R. R. Co.]

post, and instead of cutting off the air at the post, he reached over plaintiff and tried to cut it off at the motor, but instead turned it on in full force, and plaintiff's hand was seriously torn and injured. The other features of the evidence and rulings of the court sufficiently appear from the opinion. The trial court gave the general charge for the defendant upon its written request, and the appellant complained of this, and of the rulings of the court on the evidence.

HARSH, BEDDOW & FITTS, for appellant. Counsel discuss the evidence in connection with assignments 1, 2, 14, 15, 16 and 17, all having reference to proof as to whether the fellow servant of the plaintiff was competent or incompetent, such testimony attempted to be elicited as expert evidence, and insists that the court was in error in its rulings thereon.—*McCartley, et al. v. L. & N.*, 102 Ala. 194; *Montgomery v. Gilmer*, 33 Ala. 133; *Culver v. Ala. Mid.*, 108 Ala. 334; *K. C. M. & B. v. Weeks*, 135 Ala. 619; *Rollins v. State*, 136 Ala. 126; 99 C. C. A. 381; 117 Mass. 122; 20 C. C. A. 234; 85 Am. St. Rep. 384; 104 Am. St. Rep. 665; Wigmore, sec. 1984; Greenl. sec. 441; Jones on Evid. p. 87. Under assignment 3 and 4 counsel discuss the rejection of evidence of the same expert with respect to the machine, and on the above authorities insists that the court was in error in its ruling thereon. This is all under the assumption that the drill as motored by the compressed air machine was simple, and readily within the range of the common knowledge of all men, which appellant insists is not true.—*McCartley v. L. & N.*, *supra*; 104 Am. St. Rep. 671. It is competent to show the fact that the motor was found in the same place where appellant had had it when his hand was hurt as showing it to be the same motor as hurt the plaintiff.—*Birming-*

[Owen v. Ala. Gt. So. R. R. Co.]

ham Union v. Alexander, 93 Ala. 134; Greenl. pp. 81-4; Jones on Evid. sec. 6. It is competent to show whether the witness asked the boss about the machine at the time.—*U. S. C. I. & P. & F. Co. v. Granger*, 162 Ala. 637; 54 Pac. 759. The plaintiff should have been allowed to show the duty of his helper in cutting off the air.—*Sloss-S. S. & I. Co. v. Green*, 159 Ala. 182. The question as to the burs on the socket during the time the witness had been working there should have been permitted.—Authorities *supra*. If plaintiff was hurt while operating the motor, which was put into his hands by the boss boiler maker, and if the boss pointed out this machine to Hopp as the one with which the injury had been inflicted, then Hopp was brought into position where he could properly describe the condition of the machine, and this description became competent and legal testimony.—*Bir. U. v. Alexander*, 93 Ala. 134; *Davis v. Kornman*, 141 Ala. 489; *Sloss-Sheffield v. Green*, *supra*; *Adams Mach. Co. v. Turner*, 162 Ala. 352. The court erred in charging affirmatively for defendant.—*Chambless v. Mary L. C. & I. Co.*, 104 Ala. 656; *Culver v. Ala. Mid.*, *supra*; *Western S. C. & F. Co. v. Cunningham*, 158 Ala. 370; *Col. A. & E. Co. v. Bingham*, 169 Ala. 554.

A. G. & E. D. SMITH, for appellee. None of the questions first discussed by appellant called for evidence that could bind defendant.—*R. & D. v. Hammond*, 93 Ala. 181; *R. R. Co. v. Carl*, 91 Ala. 271; *R. R. Co. v. Maples*, 63 Ala. 601; *Rickets v. R. R. Co.*, 85 Ala. 600. Questions relating to the incompetency of a fellow servant were related to matters of common understanding, and could not be made the basis of expert opinion.—*Warden v. L. & N.*, 94 Ala. 277. Where an employee is injured by reason of a defect, the burden is on him to

[Owen v. Ala. Gt. So. R. R. Co.]

show not only the defect and the consequent injury, but that it was caused or not discovered and remedied owing to the negligence of the master or some persons employed by him charged with that duty.—*A. G. S. v. Brock*, 161 Ala. 351; *R. R. Co. v. Allen*, 91 Ala. 487; s. c. 99 Ala. 359, and authorities cited. The evidence showed that the fellow servant was fully competent to cut off the air at the post, that it was a simple operation, and that the adoption of that course would have rendered the machinery absolutely safe.—*M. & O. v. George*, 94 Ala. 199; *M. & C. v. Graham*, 94 Ala. 545; *Hall v. R. R. Co.*, 87 Ala. 708. The facts of this case bring it squarely within the principles laid down in *Kilby F. & S. Co. v. Jackson*, 57 South. 691, and authorized the giving of the affirmative charge.

SOMERVILLE, J.—The first count of the complaint is framed under subdivision 1 of section 3910 of the Code, and bases plaintiff's right of recovery upon a defect in the machine furnished him to work with.

The second and third counts are framed under subdivision 2 of the statute, and impute the injury to the negligence of a person in the service of defendant, who had superintendence intrusted to him, while exercising such superintendence; the charge being that such person "caused or allowed plaintiff's glove or hand covering to be caught on the occasion aforesaid, and plaintiff to suffer said injury or damage."

The fourth count charges a breach of common-law duty owed by defendant to plaintiff in this, to wit: "That defendant negligently furnished the plaintiff a person to help him in doing said work which plaintiff was employed by defendant to do, and which person so furnished by defendant for said purpose, to wit, a negro called Charlie, whose name is otherwise unknown

[Owen v. Ala. Gt. So. R. R. Co.]

to plaintiff, was not reasonably competent to do that part of the work which he was employed by defendant to do, to wit, act as helper for plaintiff in and about operating said machine."

We will separately discuss these three phases of the case.

1. The air motor with which plaintiff was working when injured was supplied to him by defendant's boss boiler maker, under whom plaintiff and his helper were working, with the injunction to use it in his work. When plaintiff applied to the boss, Weise, for a motor, the latter replied that there were some in a box in the back shop, and he or the toolroom boy went and got this motor and brought it to plaintiff. Under the first count plaintiff could not recover merely upon a showing that the motor was defective. He was bound to affirmatively show that the defect complained of arose from, or had not been discovered or remedied owing to, the negligence of defendant, or his superintendent in that behalf.—*Seaboard Mfg. Co. v. Woodson*, 94 Ala. 143, 146, 10 South. 87; *Mary Lee C. & R. Co. v. Chambliss*, 97 Ala. 171, 11 South. 897. In this plaintiff has utterly failed, for we find nothing in the evidence that has any tendency to establish such negligence, even if it be conceded that there was a defect in the motor which rendered it unsuitable or unsafe for the use to which it was devoted.

It does not appear that the motor was originally defective, nor when, how, or under what circumstances the defect arose, nor that it was ever known, or made known, to defendant or its vice principal. It was a latent defect in the sense that it was discoverable only by practical and long-continued use by an operator. It is obvious that such preliminary or subsequent tests of efficiency are not required of the master, for they

[Owen v. Ala. Gt. So. R. R. Co.]

are unusual, and entirely impracticable with respect to such machinery as this.—*L. & N. R. R. Co. v. Allen*, 78 Ala. 494; *L. & N. R. R. Co. v. Campbell*, 97 Ala. 147, 153, 12 South. 574; *Smoot v. M. & M. Ry. Co.*, 67 Ala. 13, 19, 20. Nor was there any fact or circumstance known to defendant or its superintendent which should have put it on notice that this motor was in any way defective.

The statute does not change the nature of the duty owed by masters to their servants in this regard. That duty was, and is, "to use ordinary care and diligence to furnish safe and suitable instrumentalities and appliances for the use of their employees in their business, and to keep the ways, works, machinery and plant free from defects which are dangerous, so as not to expose their employees to unnecessary perils—such care and diligence as men of ordinary prudence would exercise under like circumstances."—*Wilson v. L. & N. R. R. Co.*, 85 Ala. 269, 272, 4 South. 701; *Smoot v. M. & M. Ry. Co.*, 67 Ala. 13. On the facts shown there could arise no inference that defendant was guilty of the negligence charged.—*Mary Lee C. & R. Co. v. Chambliss*, 97 Ala. 171, 176, 11 South. 897.

2. The only testimony of any superintendence is plaintiff's testimony that Weise "was my boss, and in charge of that part of the business, and had charge of the machines." There is no evidence that it was any part of his duty to procure the machines originally, or to inspect them afterwards. And, as already pointed out, there is no evidence that he knew of any defect in this particular motor, or had any reason to suspect its presence, or that by any practicable inspection he would have discovered the defect if he had so suspected. Nor does it appear that he directed the mode of its use by plaintiff, or had any connection with the circumstances

[Owen v. Ala. Gt. So. R. R. Co.]

of the accident. The second and third counts were therefore wholly unsupported by the evidence.—*Thomas v. Bellamy*, 126 Ala. 253, 257, 28 South. 707.

3. Under the fourth count the only evidence of the incompetence of plaintiff's helper, the negro, Charlie, was plaintiff's bare statement that he was not a competent person to help at the work he was then doing. No instances of his incompetency were specified, and on cross-examination plaintiff stated that he knew how to couple the hose to the air post and cut off the air at the post, and that he had always done those things properly. There is nothing in the evidence from which it can be inferred that defendant had any knowledge, or was in any way put upon notice, that this helper was not a fit person to be intrusted with the performance of the simple and menial services that plaintiff might call upon him to render, services which required no technical skill and but little intelligence, and were to be performed under the orders and immediately under the eye of plaintiff. Certainly but little watchfulness would be required of the master or its vice principal in the selection and supervision of such servants. It is true that plaintiff says that on the day of the accident he had twice spoken to Weise "about this negro Charlie, as to his fitness." But whether he spoke in terms of praise or of disparagement is not made to appear, and is in fact a matter of mere conjecture, so far as the record informs us.

The law on this subject was stated, per Anderson, J., in *First Nat. Bank v. Chandler*, 144 Ala. 308, 39 South. 828, 113 Am. St. Rep. 39, to be that in order to recover against the defendant the plaintiff "is bound to show by affirmative testimony: (1) That the injury was the result of the act or omission of some fellow servant; (2) that said servant was incompetent for the duty he had

[Owen v. Ala. Gt. So. R. R. Co.]

to perform; (3) that the fact of his incompetency was known to the defendant, or that it, or its manager or superintendent, acquired a knowledge of it during his employment and before the accident, or by due diligence could have learned of his incompetency." It was further said that: "Negligence such as unfits a person for service, or such as renders it negligent in a master to retain him in the employment, must be habitual, rather than occasional, or of such a character as to render it imprudent to retain him in service." And again, quoting from Bailey on Master's Liability, etc.: "It is proper, when repeated acts of carelessness and incompetency of a certain character are shown on the part of a servant, to leave it to the jury whether they did come to the knowledge [of the master] if he had exercised ordinary care."

But in *Conrad v. Gray*, 109 Ala. 130, 19 South. 398, it is declared that a single act of negligence would prove neither incompetency nor notice to the master.

This helper had been in the employ of defendant for about a year, and had worked with plaintiff, off and on, for a month or more, and not a single act of incompetency is shown. So far as his original selection is concerned, the law presumes that defendant exercised due care therein.—*Conrad v. Gray, supra*; Bailey on Master's Liability, etc., 55. This presumption is here in no wise impeached. And, with respect to his retention in the service, there is nothing to show defendant's knowledge, or to charge it with notice, of his incompetency, or that due diligence would have discovered any incompetency. On such a showing, as matter of law, plaintiff was not entitled to recover on this count.—*Conrad v. Gray*, 109 Ala. 130, 135, 19 South. 398.

The foregoing views of the evidence lead to the conclusion that the general affirmative charge was properly given for defendant.

[Owen v. Ala. Gt. So. R. R. Co.]

It remains to consider whether there was prejudicial error in any of the rulings on the evidence.

It is settled in this state that where a particular employment requires technical skill, an expert who is shown to have a general acquaintance with the employment, and who knows the particular services incident thereto, and has sufficiently observed a particular person in the course of such an employment, may testify that such person is competent or incompetent for such employment.—*Buckalew v. T. C. I. & R. R. Co.*, 112 Ala. 146, 159, 20 South. 606. The expert's opinion is allowed in such a case only because, and when, the jury cannot be assumed to understand the subject, and to be able to reach an intelligent conclusion of their own, without such expert assistance. This rule was applied, in the case cited, to the position of mine boss or superintendent. By way of contrast, it has been held that the president of an oilmill could not testify whether or not his managing employee "was a good man to manage hands." The court said: "This inquiry went to the plaintiff's competency as a superintendent of the business in which he was employed, and involved a mere expert opinion of his qualifications. The capacity to manage hands is not such a question of science or skill as that jurors would be incompetent to form a correct judgment upon it without enlightenment by expert testimony. The facts showing incapacity in this particular should have been stated, so that the jury might themselves decide the question."—*Troy Fertilizer Co. v. Logan*, 90 Ala. 325, 8 South. 46. These observations apply to and control the present case with respect to the competency of plaintiff's negro helper, and the opinion of the witness Hopp as to his competency was properly excluded.

[Owen v. Ala. Gt. So. R. R. Co.]

This witness Hopp, testifying for plaintiff, stated that he went to work the next morning on the job left by plaintiff after his injury, and that he found there a motor drill like the one used by plaintiff, and that it was defective. On cross-examination he stated that he had no personal knowledge that this machine was at the place where plaintiff was working, nor that it was the same machine used by plaintiff the day before. It appeared, also, from plaintiff's testimony that there were a number of these motors in use in defendant's shops, and that there were from five to ten engines in the back shop, where plaintiff worked, being worked on by other workmen. Under this evidence we think the trial court did not err in excluding the testimony of Hopp as to the defective condition of the motor which he found ready for his own use in this back shop the next morning after the accident. Whether it was the same motor or not the jury could only have guessed.

Plaintiff asked this witness these questions: "How did you identify the place as being the place where Mr. Owen is supposed to have been hurt?" and, "How did you find out that that was the place where he was hurt?" No statement was made as to what was expected to be shown by the answers, and, as they might as well have been answered by illegal as by legal evidence, the court cannot be put in error for excluding the questions.—*B. R., L. & P. Co. v. Barrett*, 179 Ala. 274, 60 South. 262.

What the boss told Hopp, after the injury to plaintiff, as to where plaintiff was working was mere hearsay, and not admissible against defendant to prove that fact.

Plaintiff, testifying as a witness for himself, was asked by his attorney if his boss did not know that those sockets had burrs on them, and if during the 30 or 60

[Owen v. Ala. Gt. So. R. R. Co.]

days he had been working, there had been burrs on them. These questions were not confined to the socket used by plaintiff at the time he was injured, and were for that reason properly disallowed.

Plaintiff was also asked by his attorney, with respect to his negro helper, "What was his duty about cutting off air when you told him?" This question was disallowed on defendant's objection, on the ground that the helper was a fellow servant, and any failure in his duty was immaterial. There had been no testimony, at that stage of the trial, that this helper was an incompetent servant, and prima facie any inquiry as to this particular duty was inadmissible, as not bearing upon that general inquiry. Moreover, the witness stated at other times that his helper was not allowed to cut off the air at the motor, and that he regularly cut it off at the post, which substantially answered this question.

We have discussed these several rulings upon their individual merits. It is to be observed, however, that had the ruling in each case been favorable to plaintiff, the presence of all of this rejected testimony would have had no tendency whatever to supply or cure the fatal deficiencies of proof as to a material and essential element of plaintiff's case under each count of the complaint, which we have undertaken to show above.

The judgment will be affirmed.

Affirmed.

DOWDELL, C. J., and MCCLELLAN and SAYRE, JJ., concur.

[Twinn Tree Lumber Co. v. Day.]

Twinn Tree Lumber Co. v. Day.

Injury to Servant.

(Decided April 24, 1913. 61 South. 914.)

1. *Master and Servant; Complaint; Negligence of Superintendent.*—A complaint based on subdivision 2, section 3910, Code 1907, which alleges the relation between the parties, and that a named superintendent of the employer negligently directed a truck loaded for one kiln to be placed in another, whereby plaintiff was injured is not so indefinite as to be subject to demurrer even though it did not appear therefrom how the order operated to injure the plaintiff.

2. *Same; Evidence.*—The evidence examined and held insufficient to show that the injuries to the servant were caused by the negligence of the superintendent of the master.

3. *Appeal and Error; Harmless Error; Pleading.*—Where all of the defenses which were provable under the pleas to which demurrers were sustained were also provable under a plea to which no demurrers were sustained, the action in sustaining demurrers to the plea was rendered harmless.

4. *Same; Review; Verdict Against Evidence.*—Where, after making all proper allowances, it is clear that the findings and judgments of the trial court are wrong, this court will reverse notwithstanding it pays great respect to the judgment of the trial court as to the weight and credibility of the oral testimony in support of the verdict and judgment.

5. *Same; Dismissal of; Waiver.*—Where a cause was submitted to the Court of Appeals on its merits without objection to a consideration of the appeal, such objection is waived, and upon the case being transferred to this court in that condition, it will decline to consider the motion to dismiss.

APPEAL from Chilton Circuit Court.

Heard before Hon. W. W. PEARSON.

Action by J. E. Day against the Twinn Tree Lumber Company, for damages suffered while in its employment. Judgment for plaintiff and defendant appeals. Reversed and remanded.

LAVENDER & THOMPSON, and TIPTON MULLINS, for appellant. The demurrers for indefiniteness should have been sustained as the complaint failed to show how the

[Twinn Tree Lumber Co. v. Day.]

alleged negligence operated to the injury of plaintiff.—*McGhee v. Reynolds*, 129 Ala. 540. Counsel discuss demurrers to the pleas, and insist that there was error to injury. They cite *Merriweather v. Sayre M. & M. Co.*, 161 Ala. 453; *Simmerman v. Hill C. C. Co.*, 170 Ala. 553; *Black v. Roden C. Co.*, 59 South. 497, and authorities there cited. There was no testimony tending to support the material allegations of the complaint, and the insistence is that the court erred in declining the affirmative charge, and in refusing to set aside the verdict on account thereof.—*Peters v. So. Ry.*, 135 Ala. 540; *Hatch v. Varner*, 150 Ala. 440; *L. & N. v. Perkins*, 152 Ala. 133; *So. Ry. v. Carolina C. Co.*, 55 South. 134; *Mower v. Shannon*, 59 South. 568.

LOGAN & SON, for appellee. Counsel insist on its motion to dismiss the appeal, and cite authorities in support thereof, but in view of the opinion it is not deemed necessary to here set them out. The count was not subject to the demurrer interposed.—*Reiter-C. M. Co. v. Hamlin*, 144 Ala. 192; 171 Ala. 28. There was no injury in sustaining demurrers to the pleas as the matter provable under them was provable under the pleas to which no demurrers were sustained.—*Creola L. Co. v. Mills*, 149 Ala. 474. In any event, the pleas were subject to demurrer.—*Merriweather v. Sayre M. & M. Co.*, 161 Ala. 146. The court was not in error in refusing the affirmative charge or in declining to grant a new trial.—*McCormick Co. v. Lowe*, 151 Ala. 313.

SAYRE, J.—The amended complaint, by which we mean count 2, upon which the case went to the jury, was framed for the statement of a case under subsection 2 of the Employer's Liability Act, section 3910 of the Code, which allows the employee to recover when his in-

[Twinn Tree Lumber Co. v. Day.]

jury is caused by reason of the negligence of the employer's superintendent, whilst in the exercise of superintendence. It lacked much of being a perspicuous statement of the case which plaintiff expected to prove; but it cannot be said that it was so vague, uncertain, and indefinite, as the demurrer alleged, that definite issues could not be formed under it. It showed defendant's duty to plaintiff by averring the relation between the parties, and then that defendant's named superintendent negligently directed a lumber truck, which had been loaded for one kiln, to be placed in another, whereby plaintiff was hurt. This, under our decisions, constituted, at least as against the assigned grounds of demurrer, a sufficient complaint, and the demurrer was properly overruled.—*Reiter-Connolly Mfg. Co. v. Hamlin*, 144 Ala. 192, 40 South. 280. We think it might even be spelled out how the alleged order or direction operated to hurt plaintiff, but as it was not necessary for the complaint to show that, whatever of doubt and difficulty it may have in that respect did not render it demurrable.

We do not know why the assigned grounds of demurrer should have been sustained to pleas 7, A, and B, as answers to the second count of the complaint, or why, after the judgment affirming the insufficiency of these pleas, the demurrer to plea L was overruled. But that is immaterial, for any defense that could have been proved under any of the pleas held bad was provable under plea L, and there is no indication in the record that the court in any way limited defendant's effort to prove the last-named plea. Sustaining the demurrers to the several pleas first named was therefore error without injury.

On reading the testimony in this cause we are convinced there was error in overruling defendant's motion

[Twinn Tree Lumber Co. v. Day.]

for a new trial. The allegation of the complaint is that "said Suell [defendant's superintendent] negligently directed a lumber truck loaded for No. 1 dry kiln of the defendant to be placed in No. 3 dry kiln of the defendant, which [referring, we take it, to the truck loaded for kiln No. 1] was longer than the cars loaded for No. 3 kiln, thereby so closing the manway in dry kiln No. 3 of the defendant that when said car was let down the incline it bruised and injured and otherwise damaged the body of the plaintiff." That testimony of the plaintiff from which alone, since there was none to corroborate his version of the facts, the jury inferred that Suell gave either any general order that cars loaded for one kiln should be placed in another—if it may be conjectured that he was so unfit for his duties as to give any such general order—or that the particular car which caused plaintiff's injury, after being loaded for one kiln, should be placed in another, is most unsatisfactory. His first statement was that he could not tell for what kiln that car was loaded. The witnesses for defendant, on the other hand, deny any orders of the sort. They say further, and that without the slightest appearance of hesitation, evasion, or unfriendliness toward plaintiff, that all the trucks or cars were of exactly the same build, all loaded with lumber of the same length, and placed indifferently in the kilns, and plaintiff at one point in his testimony said: "Sixteen-foot lumber is the longest that goes through the kiln; the trucks on which the lumber is placed, whether for No. 1 or No. 3, are just alike, and 16-foot lumber is put on all of them." The same preponderance of testimony, direct and inferential, goes to show that the manway in the kiln where plaintiff was hurt was no more closed by the particular car on that occasion than it always was by the cars used by defendant in its business. With-

[Twinn Tree Lumber Co. v. Day.]

out dispute it goes to show that there was ample room for plaintiff in the manway, and that plaintiff was hurt by suffering himself to be caught between the car, which he had helped to put in motion, and the cross wall of the kiln. In the same way the evidence goes to show that plaintiff, immediately after he was hurt, though not seriously, accounted for his misfortune by a statement entirely out of harmony with his testimony on the witness stand and in complete accord with defendant's contention, and his only explanation or denial of that statement, in some of its most substantial parts, was that he was unconscious and did not know what he was saying. In short, the overwhelming weight of the evidence was with the defendant. Indeed, we are almost persuaded that defendant was entitled to the general affirmative charge.

We are not unmindful of the rules by which this court is governed in the determination of questions of this character. The trial judge, who hears the witnesses, and sees their demeanor on the stand, has a better opportunity than we can have to judge of the weight and credibility of oral testimony, and on appeal great respect is paid to his judgment. But this court has not renounced its duty nor neglected its power to revise the verdicts of juries and the conclusions of trial judges on questions of fact, where, in our opinion, after making all proper allowances and indulging all reasonable inferences in favor of the court below, we reach a clear conclusion that the finding and judgment are wrong.—*Gassenheimer v. Western of Alabama*, 175 Ala. 319, 57 South. 718, 40 L. R. A. (N. S.) 998; *Birmingham National Bank v. Bradley*, 116 Ala. 142, 23 South. 53; *Southern Railway v. Lollar*, 135 Ala. 375, 33 South. 32. We are clear to that conclusion in this case, and

[Drennen Co. v. Jordan.]

the judgment will be reversed, in order that there may be a new trial, if the parties so desire.

We will add that we have not considered the motion to dismiss the appeal, for the reason that the cause appears to have been submitted in the Court of Appeals, to which it first went, on its merits only. There is no notation of a submission of the motion to dismiss on the transcript of the record sent to this court from the Court of Appeals. But it appears that in fact the motion to dismiss was made in the Court of Appeals on the seventh day after the appeal had been submitted for decision. In these circumstances the only possible ruling is that the objection to the consideration of the appeal has been waived.

Reversed and remanded. All the Justices concur, except DOWDELL, C. J., not sitting.

Drennen Co. v. Jordan.

Action for Personal Injury.

(Decided April 17, 1913. 61 South. 938.)

1. *Master and Servant; Independent Contractor; Liability; Danger.*—The work of calcimining interior walls, where they can be reached with an ordinary stepladder, is not so inherently dangerous as to render the owner liable for the negligence of a servant of an independent contractor doing the work in tipping a bucket of calcimine from an insecurely fastened stepladder, causing the calcimine to break through a window and fall, with glass, on a passerby on the outside; the expression "danger" means only some contingent harm which might be reasonably foreseen and guarded against, and not a mere possibility of accident.

2. *Same; Liability to Master.*—Where the work being done by an independent contractor was the calcimining of interior walls, which could be reached with an ordinary stepladder, the building, because it contained opened and unguarded windows, was not so dangerous as to render the owner liable for an accident caused by the carelessness of a servant of the independent contractor doing the work which resulted in the calcimine going through the window on to a passerby below.

[Drennen Co. v. Jordan.]

3. *Negligence; Ordinance; Construction.*—A municipal ordinance providing that builders, architects or owners of premises, which are being improved above one story, shall erect a temporary shed to protect the passersby on the sidewalk, does not require an owner of a building having interior walls decorated to erect such shed, since the courts strive to construe an ordinance so as to give a reasonable effect to the objects and purposes intended.

APPEAL from Jefferson Circuit Court.

Heard before Hon. E. C. CROWE.

Action by Mrs. M. C. Jordan against the Drennen Company, for damages received by the falling of calcimine and glass upon her from the interior of defendant's store. Judgment for plaintiff and defendant appeals. Reversed and remanded.

J. T. STOKELY, and R. H. SCRIVNER, for appellant. Counts 1 and 5 were subject to the demurrer interposed.—*St. L. & S. F. R. R. Co. v. Sutton*, 55 South. 989. The third and fourth counts as amended failed to charge any negligence at all, as the city ordinance made the basis of those counts was without application to the work being done upon the building in question. The court was in error in permitting plaintiff to introduce in evidence the contract between defendant and Bostwick for the erection of the store.—*Long v. K. C. M. & B.*, 54 South. 62. The defendant was entitled to the general affirmative charge as to counts 3, 5 and 6.—*So. Ry. v. Lewis*, 51 South. 863; 36 Am. Rep. 320; 56 Am. Rep. 117; 26 S. E. 386. The court should have given the charges requested as to the liability of defendant for the carelessness of the servant of an independent contractor.—*Harris v. McNamara*, *supra*; *Dallas Mfg. Co. v. Towne*, 148 Ala. 136.

MORRIS LOVEMAN, and F. E. BLACKBURN, for appellee. Counsel discuss the evidence and insist that the court was not in error in its rulings, but they cite no

[Drennen Co. v. Jordan.]

authority. They further insist that there was no error in the rulings on the pleadings or in refusing charges relative to the servants of the independent contractor. —*City of B'ham v. McCrary*, 4 South. 630; *Mont. St. Ry. v. Smith*, 39 South. 757; *So. Ry. v. Lewis*, 51 South. 746; 57 N. Y. 567; *Wood on Master & Servant* 616; *L. & N. v. Donovan*, 4 South. 142; *Mayer v. Thompson Bldg. Co.*, 104 Ala. 611. Counsel discuss the other assignments, but without further citation of authority.

SAYRE, J.—Appellee recovered judgment against the appellant corporation. The relation of the parties and the circumstances in which plaintiff received her injuries were these: The Drennen Company, a mercantile corporation, had let to an independent contractor a contract for the erection of its storehouse on a much frequented street in the city of Birmingham. The contractor had completed the building and had removed temporary structures placed around the outside of the building for the protection of pedestrians on the sidewalk while the storehouse was building. Defendant had accepted the building as complete, had moved in its stock of goods, and was selling them in the ordinary way of retail trade. Shortly afterwards some splotches or discolorations appeared on the walls of the second floor, and defendant employed another independent contractor to give the walls a coat of calcimine. This contractor employed workmen to do the work, and one of these carelessly ascended a stepladder which was not properly spread, and so tipped a bucket of the stuff he was applying over against a window, breaking the glass and precipitating a part of the contents of the bucket and some broken glass upon the sidewalk below, where plaintiff received some of the calcimine upon her

[Drennen Co. v. Jordan.]

clothing and in one of her eyes. She was not injured by the falling glass.

That the work was being done by servants of an independent contractor is not denied. But the appellee insists, in line with the trial court's treatment of the case, that it was competent for the jury to hold defendant corporation liable, notwithstanding its employment of an independent contractor, for either one of several reasons, to wit: The work to be performed was of such character that, however skillfully done, its performance was necessarily and intrinsically dangerous; or defendant failed to discharge its legal duty to keep its premises in a safe condition; or it violated the municipal ordinance in evidence, requiring, under penalty, that where a house, structure, or improvement extends above one story, "it shall be the duty of the builders, architect, or owner, to erect a temporary shed or structure over the sidewalk adjacent to which said improvement is being made, with a roof of sufficient strength to resist the force of all material which may fall from the walls of said improvement as the work progresses and will protect those passing along such sidewalk."

We are clear in the conclusion that none of these principles affected this case as against defendant. It seems hardly necessary to do more than state the proposition, covering, at once appellee's first two contentions severally and collectively, that to paint the inside walls of a building, where they may be reached from an ordinary stepladder, is not to engage in the performance of a work necessarily and intrinsically dangerous to any one, certainly not to pedestrians along the streets below. "Danger" is a relative term. In the general law of negligence it includes such contingent harm or injury as reasonable prudence ought to foresee and provide against as probably in prospect. In the exercise of due

[Drennen Co. v. Jordan.]

care men must be guided by those considerations which ordinarily regulate the conduct of human affairs. "If men went about to guard themselves against every risk to themselves or others which might by ingenious conjecture be conceived as possible, human affairs could not be carried on at all. The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither reject what he can forecast as probable, nor waste his anxiety on events that are barely possible."—*Southern Ry. Co. v. Carter*, 164 Ala. 110, 51 South. 149. In the case at hand the defendant had the right to avoid responsibility for the manner in which its work was to be performed by remitting all consideration of that to its contractor, unless the work involved intrinsic danger, however skillfully performed.—*Montgomery St. Ry. Co. v. Smith*, 146 Ala. 316, 39 South. 757. No only was the work to be performed not intrinsically—that is, essentially, necessarily, or constitutionally—dangerous, but it was not even apparently or probably so, if skillfully performed.

As for the condition of the premises, no rule of due care required that defendant's building should be so constructed as to prevent the possibility of an accident, such as that shown by the evidence, and we think a casual inspection of any thousand widows in the mercantile and other business houses of our cities will demonstrate this to be the common understanding. Plaintiff's misfortune is to be taken as having resulted from the negligence of the workman, not the condition of the building. If the workman had been the servant of defendant, it would perhaps be liable; but, since he was the servant of an independent contractor, no principle of general law attaches responsibility to defendant.

On the facts shown, the ordinance imposed no duty on defendant. It must be construed reasonably and in

[Drennen Co. v. Jordan.]

connection with the purposes it was intended to serve. "The courts should strive so to construe a by-law as to give reasonable effect to the object aimed at."—McQuillin, Mun. Ord. § 289. It has been said that they should be "benevolently" interpreted.—*Kruse v. Johnson*, 2 Q. B. 91. This ordinance was designed to protect people in the street against danger from the falling of objects which the operations of constructing or improving buildings might require to be handled above the street. Due care, without legislative command, would suggest the same or some equivalent precaution. The ordinance re-enforced the rule of due care and established the necessity of a particular precaution. But the particular precaution was not required with a view to such extraordinary occurrences as that here shown. If, in order to meet the exigencies of a case like this, the ordinance be given the meaning and effect for which appellee contends, and which obtained in the court below, if temporary sheds are to be constructed to guard against the bare possibility that a workman engaged in making repairs with a pot of paint and a brush on the inside of a building, whose work does not require him to touch the walls on the outer side nor to pass his tools and materials over the heads of people on the street, may negligently allow something to drop through a window from the inside, it would result that the owners of buildings would be required to look far beyond the range covered by the provision of reasonable men in general; and, besides, it would result that streets would be well-nigh continually cluttered, disfigured, and obstructed by "temporary" structures. But we feel sure, construing the ordinance reasonably, that such was not its purpose or effect. The ordinance ought not to have been allowed to figure in the case.

[Sloss-S. S. & I. Co. v. Mitchell.]

On the undisputed facts, defendant was entitled to the general charge, and its refusal was error which obviates the necessity of considering other assignments.

Reversed and remanded. All the Justices concur. except DOWDELL, C. J., not sitting.

Sloss-S. S. & I. Co. v. Mitchell.

Damage from Overflow of Water.

(Decided April 17, 1913. 61 South. 934.)

1. *Action; Separate Cause; Damage for Overflow.*—Where the channel of a stream is permanently obstructed by a dam or fill so as to cause a constant overflow upon another's land, the damages are regarded as original, and must be recovered in one action; but where a culvert is provided, sufficient to carry off water in usual volume, thus causing only occasional recurrent overflows, the damage is continual, and each overflow constitutes a separate and distinct cause of action.

2. *Water and Water Courses; Obstructions; Measure of Damages.*—Where an obstruction in a stream causes a constant overflow of another's land, the measure of damages is the reasonable value of the land permanently overflowed, and the diminished value of the remainder of the tract not overflowed.

3. *Same.*—Where due to the obstruction of a stream the overflow of another's land is not permanent, but causes irreparable and permanent injury to the freehold, the measure of damages is the difference between the value of the premises with and without such injury at the time thereof.

4. *Same.*—Where injury to land by overflow is not permanent, and the premises may be restored to their original condition, the measure of damages is the reasonable expenses of restoring the premises plus the difference in their reasonable rental value with and without the overflow during the period thereof.

5. *Same.*—Where there was evidence of irreparable injury to land caused by an overflow the duty devolved upon plaintiff to furnish such evidence as to the nature and extent of the damage and the reasonable cost of its complete reparation as would enable the jury to ascertain or estimate the money value of the injury.

6. *Same.*—The damage for the difference between the rental value of the property with and without the damage resulting from the overflow is not to be determined by the difference between the amount of rents stipulated for or collected before and after the overflow and damage, since such amounts would be affected by too many unrelated contingencies.

[*Sloss-S. S. & I. Co. v. Mitchell.*]

7. *Same.*—Where lands of another are overflowed by reason of an obstruction in a stream and rent paying tenants are thereby driven out and do not return, and after the houses are repaired and made fit for occupancy, the owner is unable after reasonable efforts to re-rent them, the loss of rents during such period of vacancy is not a proper subject of recovery; the recovery for diminished rental value meeting the requirements of substantial justice, especially as such recovery is allowed as an injury to the land, whether there is any subsequent diminution in the actual rents or not.

8. *Same; Evidence.*—In an action for overflowing plaintiff's property evidence of the reasonable cost of repairs to the building was not admissible unless it was shown that such repairs were confined to the injuries caused by the overflow, and such costs restricted to their reparation only.

9. *Same.*—In an action for overflowing plaintiff's premises it was competent on the question of diminution in rental value to introduce evidence as to the amount of rent customarily paid by the tenants of the several houses on the land before and after the damage.

10. *Same.*—Evidence that some of the houses on the premises overflowed were vacant after the overflow, was not competent, especially in view of other evidence that the houses had not been continually occupied, and were vacated, more or less, and also that a number of the houses were not touched by the overflow and may have been vacant from other causes.

11. *Same.*—On the question of computing damages, it was competent to show by a witness acquainted with the stream and its flowage for thirty years, that he warned defendant that the pipes placed by it were not sufficient to carry off the water.

12. *Same.*—Where the allegation in the complaint was that plaintiff was the owner and in possession of the premises overflowed, and the evidence showed that he was in possession under a claim of ownership, there was no variance nor failure of proof, since possession under a claim of ownership imports ownership as against a tortfeasor.

13. *Damages; Duty to Reduce.*—It was the duty of plaintiff, owner of the premises overflowed, to reduce as far as he reasonably might the diminished rental value of the premises by restoring them to their full or former rental value if it could be done with reasonable effort, expenditure and expedition, and if he had the means and ability to do so, and neglected this duty for an unnecessary period, his recovery would abate proportionately.

14. *Landlord and Tenant; Injury to Leased Property; Right of Recovery.*—Where premises are damaged by overflow while under a lease, the diminution in rental value during the term of the lease is an injury to the tenant, recoverable by him and not by the landlord.

15. *Evidence; Facts or Conclusions.*—Where the action is for injury to property, witnesses should not generally be allowed to state that the property was or is damaged, but should state the conditions under the different circumstances and leave the conclusion to the jury.

[Sloss-S. S. & I. Co. v. Mitchell.]

16. *Appeal and Error; Harmless Error; Evidence.*—Where the testimony that the property was damaged was followed by a statement of the witness of the actual condition, his statement that the property was damaged was harmless.

17. *Charge of Court; Necessity of Requesting; Misapplying Evidence.* Where evidence is competent only on a part of the issues, and its misapplication by the jury is feared, an instruction limiting it to such issues should be requested.

APPEAL from Jefferson Circuit Court.

Heard before Hon. A. O. LANE.

Action by G. B. Mitchell against the Sloss-Sheffield Steel & Iron Company for damages for causing the waters of a branch to overflow and damage his land and buildings during the flood season. Judgment for plaintiff in the sum of \$400, from which defendant appeals. Reversed and remanded.

See, also, 167 Ala. 226, 52 South. 69.

The complaint is in four counts, the amended first and second counts of which declare upon an overflow that occurred on September 28, 1906, and are identical in form, except that the second count claims punitive damages. The third and fourth counts declare upon overflows which occurred, respectively, January 31, 1907, and May 14, 1907, and the allegations are substantially the same as those of the first and second counts, with some additional specifications of damages. These allegations, as set out in the first count, will be found in full in a former report of this case in 167 Ala. 226, 52 South. 69. The trial court gave the general charge for defendant as to count 2, but refused on defendant's request in writing to give it as to counts 1, 3, and 4. The following charge was also refused to defendant: "(6) If you believe the evidence in this case, the plaintiff is not entitled to recover for any depreciation in the rental value of the property mentioned in the complaint." The various rulings on the evidence are sufficiently shown in the opinion.

[*Sloss-S. S. & I. Co. v. Mitchell.*]

TILLMAN, BRADLEY & MORROW, and CHARLES E. RICE, for appellant. The 1st count of the complaint as last amended is subject to the demurrer interposed, as is the 3rd and 4th count. The defendant was entitled to the affirmative charge under the 3rd count also, as this cause of action is separate and distinct from the cause set out in the original complaint.—*A. G. S. v. Shahan*, 116 Ala. 305; *Freeman v. C. of Ga.*, 154 Ala. 620; *Ala. C. C. & I. v. Heald*, 154 Ala. 586; *Nelson v. 1st Nat. Bank*, 139 Ala. 587. The defendant was entitled to have the court instruct the jury as requested in charge 12.—*Sloss-S. S. & I. Co. v. Mitchell*, 49 South. 853. On the same authority charge 14 should have been given. Charge 21 should have been given on the same authority. As to what Mr. Mitchell had been getting for his houses up to the time of the January flood was not the proper inquiry.—*Sloss S. S. & I. Co. v. Mitchell*, 52 South. 72. Counsel discuss other assignments of error but without further citation of authority.

SAMUEL WILL JOHN, for appellee. For former opinion see 161 Ala. 238. Counts 1, 2, 3 and 7 were drawn under that opinion. Plaintiff is entitled to recover for any damages to the land up to the time of the verdict.—Sec. 3839, Code 1907. Counsel discuss the charges refused in the light of the former opinion in this case, and insist that they were refused without error.

SOMERVILLE, J.—The questions of primary importance presented on this appeal relate to the measure of plaintiff's damages, including the elements of damage and the proper mode of their proof.

Plaintiff's evidence tended to show that the waters of the branch overflowed upon his premises on the three occasions specified in the complaint; that the floors of

[Sloss-S. S. & I. Co. v. Mitchell.]

some of the tenant houses were covered by the flood waters for a period of several days; that in consequence some of the floors, walls, foundations, and chimneys were injured; that in September, 1906, the receding flood left mud and trash in some of the houses, and dead animals and fowls on the premises generally, which produced offensive odors; that many of the tenants moved out during this flood, some of them not returning, and that some of the houses, from 4 to 12 in number, remained vacant for a year or more, all, about 25 in number, having been previously occupied at a rental of \$5 a month each; and that the overflows in 1907 caused water to stand under about half of the houses for a day or two and got into some of them.

Where the channel of a stream is so obstructed by a permanent dam or fill as to cause a constant overflow upon another's lands, the damages are regarded as original and must be recovered in one action. But where the dam or fill is provided with a culvert sufficient to carry off the water of the stream in its usual volume, and causes only occasionally recurrent overflows, the damage is continuing, and each overflow constitutes a separate and distinct cause of action.—*Harvey v. Mason City, etc., R. Co.*, 129 Iowa, 465, 105 N. W. 958, 3 L. R. A. (N. S.) 973, 113 Am. St. Rep. 483, collecting the authorities. In this connection it is to be observed that the distinction between these two classes of cases lies not merely in the permanence of some special injury to the freehold, but rather in the permanence of the original cause and the completeness of its injurious results once and for all.—*St. Louis, etc., R. R. Co. v. Biggs*, 52 Ark. 240, 12 S. W. 331, 6 L. R. A. 804, 20 Am. St. Rep. 174, and notes. The distinction is clearly stated also in *Harvey v. Mason City, etc., R. R. Co.*, *supra*.

[Sloss-S. S. & I. Co. v. Mitchell.]

In the former class of cases the measure of the plaintiff's damages would be the reasonable value of the land permanently overflowed and the diminished value of the remainder of the tract not overflowed, if any.—*Hall v. City of Austin*, 20 Tex. Civ. App. 59, 48 S. W. 53; *Rourke v. Central Mass. Elec. Co.*, 177 Mass. 46, 58 N. E. 470; 2 Farnham on Waters, etc., p. 1869. In the latter class of cases the rule for the measure of the damages has been variously stated, and various modes of proof have been allowed by the American courts.

Where permanent (that is, irreparable) injury is done to the freehold, it would seem that the only proper measure of damages is the difference between the value of the premises with and without such injury at the time thereof.—*Drake v. Lady Ensley, etc., Co.*, 102 Ala. 501, 14 South. 749, 24 L. R. A. 64, 48 Am. St. ep. 77; *Graves v. K. C., etc., R. R. Co.*, 69 Mo. App. 574, 579.

But where the injury is not permanent, and the premises may be restored to their original condition, a different rule prevails in this state. In a former action between the present parties, founded upon the same nuisance here complained of, injuries of the character here shown were held to be not permanent but reparable, and it was said: "So far as these injuries are concerned, the true measure of plaintiff's damages was the reasonable expense of restoring the premises and the loss of income pending their restoration with reasonable effort, expenditure, and expedition."—*Sloss-Sheffield S. & I. Co. v. Mitchell*, 161 Ala. 278, 49 South. 851. On the former appeal in this case it was said: "Of course plaintiff was not entitled to recover more than his actual damages on account of loss of rents. We think the difference between the reasonable rental value of the lots and houses with and without the overflow, during the period covered by the suit, is the correct measure

[Sloss-S. S. & I. Co. v. Mitchell.]

of such damages.”—*Sloss-Sheffield S. & I. Co. v. Mitchell*, 167 Ala. 226, 52 South. 69.

As laid in the present complaint, the damage resulting from the several overflows was: (1) Permanent injury to the premises by rendering them less desirable for residence purposes; (2) irreparable injuries to the buildings by the action of the water, and to the grounds by the deposit of mud and dead animals thereon; (3) the actual loss of rents due to the compulsory abandonment of some of the houses by their tenants at the time they were flooded, and their failure to return, and plaintiff's inability to procure other tenants; and (4) general impairment and depreciation of rental value. The evidence adduced furnishes no support for the charge of permanent injury to the premises or to their rental value.

There is ample evidence to support a finding that the buildings were injured by the overflow of 1906, but it devolved upon plaintiff to furnish such data as would enable the jury to estimate the money value of that injury, to be measured by the reasonable cost of restoring the buildings to the condition in which they were when so injured. To this end it was proper and necessary to show the nature and extent of the damage done to them, and to show by competent estimate the reasonable cost of its complete reparation.

It was not proper, however, to allow plaintiff to testify that the reasonable cost of repairs that he made on the houses was \$1,500 without showing that such repairs were confined to the injuries wrought by the overflows and the cost restricted to their reparation solely. So, also, it was erroneous to allow plaintiff to testify that “during the year following these floods there was \$600 or \$700 spent in repairs there, and then about the same amount the next year.” The propriety

[*Sloss-S. S. & I. Co. v. Mitchell.*]

and necessity of the restrictions stated are too obvious to require discussion.

Plaintiff was entitled to prove, as the measure of his damages for the loss of income, the difference between the rental value of the property with and without the damage resulting from the overflows. This difference is not to be determined by the difference in the amount of rents stipulated for or collected before and after the damage, for there are too many unrelated contingencies that might vitally affect such amounts.—*Sloss-Sheffield S. & I. Co. v. Mitchell*, 167 Ala. 225, 235, 52 South. 69; 2 Farnham on Waters, etc., p. 1875. On this subject Mr. Farnham says: "There is no doubt that in determining rental value the loss of the net profits could be taken into consideration, and might, in some instances, furnish a very accurate index of the diminished value; but under most circumstances the diminished value is a much more easily ascertained and certain measure of damages than the loss of net profits."—Vol. 2, p. 1875. The author was here speaking of injury to or destruction of crops, and the first part of the language quoted is hardly appropriate to the loss of rents in such a case as the present.

We think, however, that evidence of the amounts of rent customarily paid by the tenants of the several houses just before and after the damage would be competent for the consideration of the jury on the question of rental value, and it would be for them to say whether and to what extent the diminution, if any, was due to the damaged condition of the premises, or to other causes.

But, as already stated, the right to recover for diminished rental value was qualified by the duty resting on plaintiff to minimize, as far as he reasonably might, his loss in that particular. And that duty in the present

[Sloss-S. S. & I. Co. v. Mitchell.]

case was to restore the premises to their full or former rental value, "with reasonable effort, expenditure, and expedition."—*Sloss-Sheffield S. & I. Co. v. Mitchell*, 161 Ala. 278, 283, 49 South. 851. Having the means and ability to do so, his neglect of the duty for an unreasonable (that is, unnecessary) period of time would abate his recovery proportionately. In *Graves v. K. C., etc., R. R. Co.*, 69 Mo. App. 574, 579, a case much like this, it was said: "If the destruction of the fences and houses interfered with the beneficial enjoyment of the premises, then, in addition to the value of the property destroyed, the loss of the rental value for the time it would have taken to restore the improvements should be added.—3 Sedg. Damages, §§ 938, 1015." To the same effect are *City of Keithsburg v. Simpson*, 70 Ill. App. 467, and *Helbling v. Allegheny Cemetery Co.*, 201 Pa. 171, 50 Atl. 970.

Upon this issue, or upon any other, it was not proper to allow plaintiff to testify that eight or ten of the houses were vacant the second year after the overflows, and six or eight the third year; and this impropriety is emphasized in view of plaintiff's further testimony that the houses had not been continually occupied and "were vacated more or less." Moreover, a number of the houses were not touched by the overflows, and some of these may have been afterwards vacant from other causes. Clearly such evidence could form no basis either for the estimation of rental value or of the loss of rents due to the expulsion of tenants by the flooding of their houses.

This leads us to a consideration of the question whether plaintiff may have been entitled to recover specially for the actual loss of rents, independently of his general recovery for diminished rental value. That is to say, if the flooded houses were occupied by rent-

[Sloss-S. S. & I. Co. v. Mitchell.]

paying tenants who were driven out by the flood and did not return, and, after the houses were restored and made fit for occupancy again, plaintiff was unable by reasonable effort to retenant them, is the loss of rents during such period of vacancy capable of satisfactory proof and a proper subject of recovery? Something might be said in favor of the justice of its allowance; nevertheless, we think it inadvisable for courts to venture into a field so full of speculation and uncertainty, and that the rule already laid down by this and other courts, allowing full recovery for diminished rental value, will meet the requirements of substantial justice. For it is to be noted that that rule allows that measure of recovery *as an injury to the land*, whether there is any subsequent diminution in the *actual* rents or not.

In this connection it is to be observed that, if any part of the damaged premises is under lease at the time of the damage, the diminution in rental value during the term of the lease is an injury to the tenant and not to the landlord, and for it the tenant may recover.—2 Farnham on Waters, etc., §§ 591, 5591a. The injury to the landlord in this respect would be only from the termination of pending leases. It follows, of course, that testimony as to some of the tenants moving out and their houses remaining unoccupied for varying periods, as to the demand for the houses before and after the overflows, as to the loss of rents after the overflows, and such like matters, should not have been submitted to the jury.

Witnesses should not in general be allowed to state that property was or is damaged, but should state its condition and leave the conclusion to the jury.—*Gosdin v. Williams*, 151 Ala. 592, 595, 44 South. 611; *Central of Georgia R. Co. v. Keyton*, 148 Ala. 675, 41 South. 918; *Atlanta & B., etc., R. R. Co. v. Brown*, 158 Ala.

[Sloss-S. S. & I. Co. v. Mitchell.]

607, 48 South. 73. In the present case, however, plaintiff's statement that the lumber in the houses was damaged was followed by a statement of the actual conditions resulting from the overflow, and hence the error was harmless.

On the issue of wanton injury under the second count, it was competent for the witness Howell to testify that he had warned defendant's servant, who placed the pipes under the fill in question, that they were insufficient to carry off the water, and that the water required the entire channel. The witness had been acquainted with the branch and its flowage for 30 years, and presumably was giving the result of his personal observations. Of course the witness' warning was not competent or material evidence under the issues of the other counts. In such a case the defendant should request an instruction limiting the testimony to the issue to which it is appropriate, if its misapplication by the jury is feared.

The complaint alleges that "plaintiff was the owner and in possession of the overflowed premises." The evidence showed that he was in possession of the premises under claim of ownership. Such possession imports ownership, and a tort-feasor is in no position to deny the rights of a plaintiff in peaceable possession.—*Hendrick v. Johnson*, 5 Port. 208, 212; *So. Ry. Co. v. Leard*, 146 Ala. 349, 363, 39 South. 449; 2 Farnham on Waters, etc., p. 1879, § 591. There was here neither a variance nor a failure of necessary proof in this regard and defendant's requests for affirmative charges on that theory were properly refused.

For the errors pointed out, the judgment will be reversed, and the cause remanded for another trial.

Reversed and remanded. All the Justices concur, except DOWDELL, C. J., not sitting.

[Sloss-S. S. & I. Co. v. Morgan.]

Sloss-S. S. & I. Co. v. Morgan.

Damages from Overflow.

(Decided February 6, 1913. 61 South. 283.)

1. *Waters and Watercourses; Pollution of Stream; Prescriptive Right.*—The fact that a corporation has acquired a prescriptive right to so pollute a stream as to greatly impair its usefulness to a lower riparian owner does not give it a right to burden the lower estate by continuously depositing in the stream debris from its mining operations, which is carried down the stream and deposited upon the lower estate, tending eventually to destroy its value.

2. *Same; Evidence to Title.*—Where the action was by a lower riparian owner for damages to his lands from pollution of a stream, evidence that the owner had lived on the land for fifty years claiming to own it, with an intermission at one time of several years, and had lived there continuously for the last fifteen years exercising acts of ownership, was sufficient to establish his title without introducing his muniments of title in evidence, where there was no proof of ownership in another.

3. *Same.*—Although all the deposits may not have been made during the limitation period pleaded, evidence of the value of land affected both before and after the deposits upon the land of which plaintiff complained was properly admitted, at least as against a general objection.

APPEAL from Walker Circuit Court.

Heard before Hon. J. J. Curtis.

Action by R. M. Morgan against the Sloss-Sheffield Steel & Iron Company for damages to land by the deposit of debris thereon. Judgment for plaintiff and defendant appeals. Affirmed.

BANKHEAD & BANKHEAD, for appellant. Defendant's special plea 6 was good, and demurrers were improperly sustained thereto.—*Shahan v. A. G. S.*, 115 Ala. 181; *Sloss-S. S. & I. Co. v. Dorman*, 159 Ala. 321. Plaintiff had notice of the acquirement by defendant of the prescriptive right to deposit debris in the stream and acquiesced therein.—*Sloss-S. S. & I. Co. v. Mitchell*, 52

[Sloss-S. S. & I. Co. v. Morgan.]

South. 72. The evidence of title was not sufficient to authorize plaintiff's recovery, and the questions as to damages were improperly admitted.—*Ala.-Cent. v. Musgrove*, 169 Ala. 424.

W. C. DAVIS, and R. A. COONER, for appellee. Plea 6 presented no defense and demurrers were properly sustained.—*Polly v. McCall*, 37 Ala. 20; *S. A. M. v. Buford*, 106 Ala. 309; *Shahan v. A. G. S.*, 115 Ala. 181. The positive, negative wrong can never ripen into a right.—*Sloss-S. S. & I. Co. v. Mitchell*, 161 Ala. 278. The evidence as to title was sufficient without the introduction of muniments.—*So. Ry. v. Laird*, 39 South. 449; *A. G. S. v. Johnson*, 128 Ala. 295; 13 A. & E. Enc. of Law, 432. There was no error in the admission of evidence as to damages.—*Gosdin v. Williams*, 44 South. 611; *Brinkmeyer v. Bethea*, 139 Ala. 376.

SAYRE, J.—Plaintiff (appellee) sued to recover damages, alleging that defendant company in the operation of its coal washer and coke ovens on Horse Creek, above his property, had made deposits of dirt, mud, slate, slag, ashes, and other debris in the bed of the stream, thereby causing the stream to overflow, and deposit said debris of various kinds upon his land, greatly impairing its value for agricultural purposes, rendering the water wholly unfit for his cattle or other domestic uses; poisoning the fish, and otherwise impairing the use and value of plaintiff's premises. The theory of plea 6 is that, since the washer and coke ovens have been maintained under claim of right for more than 10 years with the same constantly recurring results, defendant had acquired the right to operate them in the manner and with the results indicated—had acquired an indefeasible easement. Public concern about the

[Sloss-S. S. & I. Co. v. Morgan.]

reasonable exigencies of agriculture and manufacturing enterprise must be allowed to abate somewhat of the right of riparian proprietors to have a stream flow as it has been accustomed to flow, to receive and discharge it without appreciable impairment of its original volume or purity. This court said in *T. C. I. Co. v. Hamilton*, 100 Ala. 261, 14 South. 167, 46 Am. St. Rep. 48, that it was difficult, if not impossible, to declare the extent of this necessary concession in any precise rule applicable to all cases. It was said, however, that a stream must not be so corrupted or polluted as practically to destroy or greatly impair its value to the lower riparian owner. The courts hold, also, to the rule that, where the pollution of a water course does not constitute a public nuisance, the right to so pollute may be acquired as against a riparian owner by prescription.—*Alabama Consol. Coal Co. v. Turner*, 145 Ala. 639, 39 South. 603, 117 Am. St. Rep. 61. But the right which may be so secured is limited by the character and extent of that exercised on the one hand and endured on the other for the period of prescription, and for any increase causing material additional injury an action may be maintained.—*Mississippi Mills v. Smith*, 69 Miss. 299, 11 South. 26, 30 Am. St. Rep. 546, and note. It results that, whatever may be said in respect of defendant's acquirement by continuous adverse use of the right to pollute the stream in question so as to destroy plaintiff's fishery, if that term be not too weighty for the case, and render the water unfit for cattle or other domestic uses, defendant's continuous deposit of the debris from its mining operations in the stream, by which it has been carried down and thrown upon plaintiff's land, has continually added to the burden and injury of the lower estate, and has a natural, if not inevitable, tendency to destroy it in the end. In such

[Sloss-S. S. & I. Co. v. Morgan.]

case it seems hardly necessary to say there can arise no presumption of a grant of right to invade continually the lands of lower proprietors with continually increasing detriment by additional deposits of debris, though the scheme of invasion may have been initiated by a wrong long since past remedy, and that for every increment of such wrong the injured proprietor may bring suit (note to *Shelby v. Cleveland Mill Co.*, Ann. Cas. 1912C, 179) in his own time, his recovery being confined to the damage suffered within the statutory period of limitation (*Polly v. McCall*, 37 Ala. 20). It follows that the demurrer to the sixth plea was properly sustained.

Defendant was not entitled to the general charge as it contends. This contention appears to be based upon plaintiff's failure to produce his muniments of title. But, with an intermission at one time of several years, he had lived upon the land for fifty years claiming to own it, and during the last 15 or 20 years he had continually lived there, exercising acts of ownership over the entire tract. This possession with claim of ownership was evidence of title, and in an action of this character was sufficient to establish plaintiff's interest, in the absence of proof of ownership in another.—*A. G. S. R. R. v. Johnston*, 128 Ala. 283, 29 South. 771.

In view of plaintiff's acquaintance with the land, it was competent for him as a witness for the proof of his measure of damages to state the value of the land immediately affected both before and after the deposits of which he complained. At least, this was so as against a mere general objection. If it seemed necessary, and defendant desired to limit the inquiry to damage done within the period of limitation pleaded, his objection should have taken the point specifically. And, further, to answer the specific objection now taken for the first

[Mauldin v. Central of Ga. Ry. Co.]

time, considering that this was not a proceeding for condemnation under the right of eminent domain, that there had been no division of the land into town lots, and that no contention arose as to consequential damage or benefit to those parts of the land not covered by the deposits, there was no room for the application of the rule of *Alabama Central Railroad v. Musgrove*, 169 Ala. 424, 53 South. 1009.

We have considered the errors assigned without finding cause for reversal.

Affirmed.

DOWDELL, C. J., and MCCLELLAN and SOMERVILLE, JJ., concur.

Mauldin v. Central of Ga. Ry. Co.

Maintaining Nuisance.

(Decided February 13, 1913. Rehearing denied April 23, 1913.
61 South. 947.)

1. *Navigable Waters; Bridges; Authorizing Construction and Maintenance.*—It is within the power of the states to authorize the construction of bridges across navigable streams within their limits, until Congress has taken cognizance thereof or acted thereon.

2. *Same; Obstructions; Actions; Pleading.*—A complaint which alleges the construction of a bridge across a navigable stream by a defendant, the piers or substructure of which obstructed the passageway of the stream, except for the narrow spaces between such piers, that driftwood had collected against the substructure obstructing the use of the river for the purpose of floatage of logs and timber, and causing plaintiff special damages, but which fails to allege whether it was built, since the passage of the Act of Congress of March 3, 1889, fails to show the maintenance of the bridge was a public nuisance.

3. *Pleading; Construction.*—Pleading will be construed most strongly against the pleader.

4. *Same; Conclusion.*—Allegations that a bridge across a navigable stream constituted an unreasonable obstruction of navigation and

[Mauldin v. Central of Ga. Ry. Co.]

was maintained without authority of law were mere conclusions of the pleader.

5. *Evidence; Judicial Notice; Official Proceedings.*—State courts have no judicial knowledge as to whether plans and specifications for a bridge across a navigable stream was submitted to and approved by the Chief of Engineers and the Secretary of War as required by the Federal authorities; this being a fact to be determined by the jury from the evidence.

APPEAL from Geneva Circuit Court.

Heard before Hon. H. A. PEARCE.

Action by C. M. Mauldin against the Central of Georgia Railway Company for damages for maintaining a public nuisance in the erection and maintenance of a bridge across a navigable stream. Judgment for defendant and plaintiff appeals. Affirmed.

EVANS & PARRISH, for appellant. The obstruction was prima facie a nuisance.—*Walker v. Allen*, 72 Ala. 456; 12 Fla. 328; 73 Ga. 306; 7 Ill. App. 599; 43 Me. 198; 9 N. J. E. 754; 38 Barb. 286; 60 N. Y. 510; 23 Wis. 410; 4 Ind. 36. No amount of benefits to an indefinite number of individuals or to a community can countervail the public inconvenience resulting from the obstruction of a navigable river—*Gold v. Carter*, 49 Am. Dec. 712; 31 Fed. 354; 23 Wis. 154; 7 L. R. Eq. 377. The right of navigation is paramount to right of crossing by bridge or ferry.—1 Bizz. 511; 28 Wis. 522; *Babcock v. Herbert*, 3 Ala. 392. A bridge cannot be constructed and maintained across navigable streams without the joint or concurrent consent of the State and Federal Governments.—11 L. R. A. (N. S.) 106.

W. O. MULKEY, for appellee. Until Congress acts, the state has the right of control in permitting the erection of bridges over streams which are navigable only in its borders.—*Cardwell v. Bridge Co.*, 113 U. S. 205; *Hamilton v. R. R. Co.*, 119 U. S. 280. The state

[Mauldin v. Central of Ga. Ry. Co.]

having granted the right to construct the road by a necessary implication granted the right to construct all bridges as a necessary part thereof, and unless the bridge is constructed contrary to the provisions of the charter or the laws of the state, the bridge cannot be said to be a nuisance.—*G. R. N. Co. v. Chesapeake Ry. Co.*, 2 L. R. A. 540. All are entitled to a reasonable use of the stream.—*Blackman v. Mauldin*, 51 South. 23; 27 Mich. 533; 33 W. Va. 14; 21 S. E. 941; Farnham on Waters, 29. The complaint was therefore subject to the demurrers interposed.—22 L. R. A. 368. There is marked difference between the liability of he who constructs and he who maintains.—10 A. & E. Ann. cases 350; 2 Ib. 868; 24 Cyc. 1125; 33 Ib. 706.

MAYFIELD, J.—This is an action in tort for the maintenance of a public nuisance in that, as alleged, the defendant obstructs a navigable stream. Demurrers were sustained to a number, if not to all, of the 14 counts of the complaint. The only errors assigned, however, are as to counts 12, 13, and 14.

The plaintiff is alleged to have been engaged in the business of rafting logs and lumber down the Choctaw-hatchie river, and the defendant in the business of operating a commercial railroad which crosses this river. It is alleged that a part of defendant's railroad consisted of a bridge which spanned this river, and that the piers or substructure of the bridge obstructed the passageway of such stream, except a space of about 30 feet in width, and that driftwood collected against said substructure and thus obstructed the use of said river for the purpose of navigation in floating logs and timbers down said river, and that on certain occasions mentioned the plaintiff was damaged on account of said obstructions, in that he lost a part of his rafts by reason

[*Mauldin v. Central of Ga. Ry. Co.*]

thereof. The main contention is narrowed down to this: Did any one of these counts sufficiently allege the maintenance of a public nuisance?

The law as to the obstruction of streams like the one in question, and as to the right of individuals for damages on account thereof, has been the subject of repeated adjudications in both the state courts and the federal court. The Supreme Court of the United States, after referring to these cases, in the case of *Cardwell v. Bridge Company*, 113 U. S. 210, 5 Sup. Ct. 425, 28 L. Ed. 959, said: "These cases illustrate the general doctrine, now fully recognized, that the commercial power of Congress is exclusive of state authority only when the subjects upon which it is exerted are national in their character and admit and require uniformity of regulations affecting alike all the states; and that when the subjects within that power are local in their nature or operation, or constitute mere aids to commerce, the states may provide for their regulation and management, until Congress intervenes and supersedes their action." In the same case it is said: "The control of Congress over navigable waters within the states so as to preserve their free navigation under the commercial clause of the Constitution, the power of the states within which they lie to authorize the construction of bridges over them until Congress intervenes and supersedes their authority, and the right of private parties to interfere with their construction or continuance, have been fully considered, and we are entirely satisfied with the soundness of the conclusions reached. They recognize the full power of the states to regulate within their limits matters of internal police, which embraces among other things the construction, repair, and maintenance of roads and bridges, and the establishment of ferries; that the states are more likely to appreciate the

[Mauldin v. Central of Ga. Ry. Co.]

importance of these means of internal communication and to provide for their proper management than a government at a distance; and that, as to bridges over navigable streams, their power is subordinate to that of Congress, as an act of the latter body is, by the Constitution, made the supreme law of the land; but that until Congress acts on the subject their power is plenary. When Congress acts directly with reference to the bridges authorized by the state, its will must control so far as may be necessary to secure the free navigation of the streams. In *Wilson v. Blackbird Creek Marsh Co.*, 2 Pet. 245 [7 L. Ed. 412], a dam had been constructed across a small navigable river in the state of Delaware, by authority of its Legislature; and this court held that the obstruction which it caused to the navigation of the stream was an affair between the government of the state and its citizens, in the absence of any law of Congress on the subject."

The case in which the question has probably received the fullest consideration is that of *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. Ed. 96. The members of the court in that case were divided in opinion, and therefore the case was thoroughly and fully considered by the whole court and the law upon the subject learnedly and ably examined and expounded. In that case it was said: "It is almost as important that the law should be settled permanently as that it should be settled correctly. Its rules should be fixed deliberately and adhered to firmly, unless clearly erroneous. Vacillation is a serious evil. 'Misera est servitus ubi lex est vaga aut incerta.' * * * Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a state other than those in which they

[Mauldin v. Central of Ga. Ry. Co.]

lie. For this purpose they are public property of the nation, and subject to all the requisite legislation by Congress: This necessarily includes the power to keep them open and free from any obstruction to their navigation, interposed by the states or otherwise, to remove such obstructions when they exist, and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of offenders. For these purposes Congress possesses all the powers which existed in the states before the adoption of the national Constitution, and which have always existed in the Parliament in England. It is for Congress to determine when its full power shall be brought into activity, and as to the regulations and sanctions which shall be provided. * * * The national government possesses no powers but such as have been delegated to it. The states have all but such as they have surrendered. The power to authorize the building of bridges is not to be found in the federal Constitution. It has not been taken from the states. It must reside somewhere. They had it before the Constitution was adopted, and they have it still. 'When the Revolution took place the people of each state became themselves sovereign, and in that character hold the absolute right to all their navigable waters and the soil under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government.' * * * In the *Wheeling Bridge Case* this court placed its judgment upon the ground 'that Congress had acted upon the subject, and had regulated the Ohio river, and had thereby secured to the public, by virtue of its authority, the free and unobstructed use of the same, and that the erection of the bridge, so far as it interfered with the enjoyment of this use, was inconsistent with and in violation of the acts of Con-

[Mauldin v. Central of Ga. Ry. Co.]

gress, and destructive of the right derived under them; and that, to the extent of this interference with the free navigation of the Ohio river, the act of the Legislature of Virginia afforded no authority or justification. *It was in conflict with the acts of Congress, which were the paramount law.*' * * * It must not be forgotten that bridges, which are connecting parts of turnpikes, streets, and railroads, are means of commercial transportation, as well as navigable waters, and that the commerce which passes over a bridge may be much greater than would ever be transported on the water it obstructs. It is for the municipal power to weigh the considerations which belong to the subject, and to decide which shall be preferred, and how far either shall be made subservient to the other. The states have always exercised this power, and from the nature and objects of the two systems of government they must always continue to exercise it, subject, however, in all cases, to the paramount authority of Congress, whenever the power of the states shall be exerted within the sphere of the commercial power which belongs to the nation. The states may exercise concurrent or independent power in all cases but three: (1) Where the power is lodged exclusively in the federal Constitution. (2) Where it is given to the United States and prohibited to the states. (3) Where, from the nature and subjects of the power, it must necessarily be executed by the national government exclusively."

Appellant does not deny the law upon this subject to have been as announced above at the time it was so announced; but his insistence is that the law has been changed since those decisions by acts of Congress, which change is contemplated, or the power to make it, in the decisions above referred to. The act relied upon as working this change is that of March 3, 1899, c. 425,

[Mauldin v. Central of Ga. Ry. Co.]

and the amendments thereto, 30 State. at Large, 1151 (U. S. Comp. St. 1901, pp. 3540, 3541). While it is very true that these and many other federal statutes before and since, have made regulations in this matter, we do not find any which would have the effect of making the bridge in question a public nuisance, from anything appearing in this complaint. Those acts all provide that bridges like the one in question may be built across streams like the one in question, under the authority of the Legislature of a state, provided the locations and places therefor are submitted to, and approved by, the Chief of Engineers and the Secretary of War before their construction is commenced. There is no allegation in this complaint that the structure was built since the passage of the act of Congress referred to, or that the structure was built without the approval of the War Department, as is provided for in the statute. In fact, there is no claim here that the initial structure was wrongfully or unlawfully erected, but the gravamen of the charge is that it has been allowed to become a nuisance by the accumulation of driftwood against the piers or substructure of the bridge, so as to obstruct navigation.

Construing the counts most strongly against the pleader, as we are required to do, no special damage would have come to him, for which alone he sues and can sue in this action, except for the fact that driftwood was allowed to collect against the substructure and thus obstruct navigation for his rafts. The specific allegation is as follows: "That, by so maintaining and operating said bridge, said river became liable to be blocked, as to navigation, by loose timbers floating down said river and lodging against the supports of said bridge; that it became the duty of defendant to keep open said passageway under said bridge for the passage

[Mauldin v. Central of Ga. Ry. Co.]

of rafts of timber floated down said river * * * so that when plaintiff approached said bridge with said rafts of timber on, to wit, at times between the 28th of September and the 3d of October, 1907, plaintiff found said passageway under said bridge so blocked as above described, and as a result thereof plaintiff was delayed, to wit, 150 days in getting his timber to market," etc. There is no allegation in any one of the three counts complained of that the bridge was built without authority of law; nor is there any claim of damages for the erection or creation of a nuisance other than that arising from allowing the driftwood to collect against the substructure of the bridge, which obstructed navigation for the purposes for which plaintiff used the river, thereby causing him to suffer special damages.

The character and capacity of the river in question, as for navigation, was discussed and considered in the case of *Blackman v. Mauldin*, 164 Ala. 337, 51 South. 23, 27 L. R. A. (N. S.) 670. It was there held to be navigable as for floatage, such as rafts, as is claimed in this case. In the case of *Trullinger v. Howe*, 53 Or. 219, 97 Pac. 548, 99 Pac. 880, 22 L. R. A. (N. S.) 545, it is said: "The right of the public to use a navigable or floatable stream in its natural condition is not paramount to the right of a riparian owner to construct dams therein and use the waters for power purposes, so long as he does not materially affect or abridge the public right. The rights of each must be exercised with due regard to the existence and preservation of the rights of the other. The right of passage is, to some extent, necessarily the dominant right, because it is the right to move on or by. It, in the nature of things, cannot be exercised unless the other temporarily yields to it, but it is not an exclusive right, and must not be usurping, excessive, or unreasonable." If this be true

[Mauldin v. Central of Ga. Ry. Co.]

as to individual riparian owners, surely it must be equally true as to public service corporations, such as railroads, common carriers, who are authorized to cross, and of necessity must cross, such streams with their lines of railroads.

The case of *P. & A. R. R. Co. v. Hyer*, 32 Fla. 539, 14 South. 381, 22 L. R. A. 368, is very much like the case at bar. That was a suit by a navigator against a railroad company for obstructing navigation by allowing logs, etc., to accumulate under the draws of its bridge, thereby breaking the propeller of plaintiff's boat. The court in that case said: "What, then, is the defendant's default that has wrought the damage complained of? We find it in the allegation that 'the defendant permitted the space of the said draw, through which said boat had to pass, to become obstructed by snags, posts, logs, and other obstacles below the surface of the water and invisible to persons in plaintiffs' said boat, insomuch that, when the plaintiffs' said boat undertook to pass through the same, her propeller struck against the said obstructions and was broken,' etc. It will be observed that in this, the gravamen of the complaint, there is no charge that the alleged obstructions were present in the waters under the draw through any instrumentality of the defendant, or in consequence of any faultiness in its structures, but the charge is that the defendant 'permitted' the space under the draw to 'become obstructed,' thereby implying that the obstructions were present there, not through the active instrumentality of the defendant, but through other agencies, and that the defendant was in default in not removing them and in passively permitting them to remain there. In other words, as is contended here, it is assumed by the plaintiffs that it is the defendant's duty at all times to keep the water highways passing through and under

[Mauldin v. Central of Ga. Ry. Co.]

its drawbridge free from all obstructions, no matter how they become present there. And the injury resulting to plaintiffs' boat from the defendant's neglect of this, its alleged duty, is the foundation for the suit. In this contention we cannot agree with the counsel for the appellees."

While there are allegations in the complaint that the bridge constituted an unreasonable obstruction of the navigation of said river, and was maintained by the defendant without authority of law, this is a mere conclusion of the pleader, not supported by allegations of facts. As we gather from the brief of counsel, the only contention is that there was a lack of authority from Congress to build the bridge, and thus to partially obstruct the navigation of this stream.

As before stated, the federal law requires only that the plans and specifications for such structures be submitted to, and approved by, the Chief of Engineers and by the Secretary of War before construction be commenced. If this was not done in the present case, it should have been alleged. This is not a matter of which the trial court could, or this court can, take judicial knowledge. So far as this court can know, the Chief of Engineers and the Secretary of War may have approved the specifications submitted to them for this particular bridge, and it may have been built, and have remained ever thereafter, according to such specifications. Or it may be that no specifications were ever made or submitted to them. We have no judicial knowledge on this subject. This is a question of fact and not of law.

Recurring to the initial or original proposition stated in the opinion, which is the real question passed upon by the lower court, and insisted upon as error on appeal, we do not think that either count 12, 13, or 14

[Mauldin v. Central of Ga. Ry. Co.]

showed the maintenance of a public nuisance, and in our opinion the trial court, for this reason, properly sustained demurrers to each of these counts. Construing the pleadings most strongly against the pleader, as we are required to do, we do not think that the counts showed the maintenance of a public nuisance. They were for this reason subject to the demurrer interposed. We concede that each of the counts does show such special damages as would entitle the plaintiff to recover, if he had showed that the defendant had maintained a public nuisance. We gather from the pleadings and from the brief of counsel that the question presented to the trial court was whether any one of these three counts (12, 13, or 14) sufficiently showed the maintenance of a public nuisance. We do not think that these counts presented, or were intended to present, the question of the erection or creation of a public nuisance, but only the question of maintaining such a nuisance. We are reviewing on this appeal, of course, only the questions presented to and decided by the trial court. Considering the case in this light, as we are constrained to consider it, we are not prepared to say that the trial court erred in the rulings on the demurrers to counts 12, 13, or 14.

This, of course, must result in an affirmance of the judgment of the trial court, whatever may be the absolute rights of the litigants.

Affirmed.

DOWDELL, C. J., and ANDERSON and DE GRAFFENRIED, JJ., concur.

[Bowles v. Lowery.]

Bowles v. Lowery.*Ejectment.*

(Decided April 15, 1913. 62 South. 107.)

1. *Adverse Possession; Color of Title.*—Color of title is a writing which in appearance purports to, but in reality does not, transmit title or the right of possession.

2. *Same; Extent of Possession.*—In the absence of color of title, title by adverse possession can be acquired only to the land actually occupied by the adverse claimant, or those through whom he claims.

3. *Same; Evidence; Definiteness.*—In the absence of bona fide claim under color of title, inheritance or purchase, the evidence which will authorize a recovery must furnish data from which actual possession of a definite, particular area may be ascertained; it cannot be left to speculation or conjecture.

4. *Same.*—Indicia of actual possession of a part or parts of a forty-acre tract, or of three acres thereof about a spring is insufficient, in the absence of evidence of possession of any particular part, or of the particular form of the three acres.

5. *Same; Notice; Statute.*—Since the passage of section 1541, Code 1896, one cannot acquire title by adverse possession without having filed the required notice, unless his entry was under color of title, bona fide claim of inheritance, or of purchase.

6. *Same; Instructions.*—That there may be an adverse possession there must in addition to the other elements be an exclusive possession; hence, an instruction asserting that if a plaintiff acquired actual possession of the land at a certain time and kept continuous possession, doing certain things for twenty-five years, this adverse possession will ripen into title, in failing to hypothesize that the act of possession was exclusive, was affirmatively erroneous.

7. *Executors and Administrators; Right of Widow; Ejectment.*—Where one acquires title by adverse possession, his widow as such, can maintain ejectment for it if it is so related to the place of his last residence as to make it subject to the widow's quarantine right.

8. *Deeds; Parties.*—Where no names of persons purporting to be grantors are set out in the body of the deed, the identity of the persons purporting to grant and convey is clear and certain where their names are signed at the appropriate place to the deed, and this is true as well with respect to the warranty and other features, although the pronoun "me" is employed in the acknowledgment of receipt of payment of the consideration, and the pronoun "I" in the granting clause and in the warranty and other features.

9. *Acknowledgment; Form.*—Only a substantial compliance with the form of acknowledgment by the statute is required.

[Bowles v. Lowery.]

10. *Same; Instructions.*—The acknowledgment and the deed are to be read together in construing the acknowledgment.

11. *Same.*—Where the certificate of acknowledgment read that "B., her heirs, whose name is signed to the foregoing conveyance and who is known to me, etc.," when taken in connection with the evidence that the other signers were all of the children of B., except the grantee, it is to be read with "and" between the word "B." and the words "her heirs," and with the word "are" in the place of the word "is" where it occurs, and hence, must be construed as a certificate of acknowledgment by all the grantors.

12. *Same; Clerical and Grammatical Errors.*—If what was intended to be expressed can be clearly seen, without resort to mere inference or conjecture, errors of a purely clerical or grammatical nature will not avoid a certificate of acknowledgment.

13. *Evidence; Parol Evidence; Intention.*—In aid of the interpretation of the acknowledgment, evidence that the signers of a deed, except the grantee, were all of the children of one of the grantors, is admissible; such evidence not contravening the rule against direct parol evidence of intention.

14. *Charge of Court; Misleading; Instructions.*—As to whether or not an instruction was calculated to mislead the jury, reference must be had to the evidence.

APPEAL from Fayette Circuit Court.

Heard before Hon. BERNARD HARWOOD.

Ejectment by Mary Lowery against John L. Bowles. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The facts sufficiently appear from the opinion. The following are the charges referred to in the opinion:

"If the jury is reasonably satisfied from all the evidence that plaintiff's husband acquired actual possession of the land sued for in 1871 or 1872, and that her husband kept continuous possession, claiming it as his own, cutting timber thereon, such as sawings, timber, firewood and cross-ties, and cleared a portion of said land and cultivated it continuously for 25 or 30 years, this adverse possession would ripen into a title, and plaintiff would be entitled to recover the land sued for, together with the reasonable rental value for its detention as shown by the testimony.

[Bowles v. Lowery.]

“(2) Under the evidence in this case the defendant, if he had any title to the land sued for, has only such title as he may have gained by adverse possession of the land, and he has no title by adverse possession unless he has for some 10 years together, without interruption, been in the notorious and exclusive possession of the land, in open hostility to all other persons claiming title to it.”

“(7) The deed or instrument purporting to have been executed by the widow and heirs of the father of the defendant is not color of title, so far as the 40 acres in controversy is concerned, unless the jury believes from the evidence that the defendant’s father has had actual possession of the same.

BEASLEY & WRIGHT, for appellant. Regardless of whether the deed from Mrs. Bowles and the other heirs was admissible as color of title only the defendant in this case was an heir of John Bowles, and clothed with all his right of possession.—157 Ala. 434. The words “I” and “me” used in the granting clause of said deed had reference to each individual signer thereof, and the deed passed the legal title.—69 Ala. 221; 132 Ala. 354; 39 South. 772; 154 Ala. 100; *Sloss-S. Co. v. Lollar*, 170 Ala. 239. The deed from the Bowles’ heirs to defendant could be used even if the land was held adversely by plaintiff at the time said deed was executed.—168 Ala. 215. The widow was not entitled to recover from an adverse holder.—*Hayes v. Lemoyne*, 156 Ala. 465. By bringing ejectment, the widow admits that defendant was in possession, and having only an inchoate right of dower could not bring ejectment.—*Reeves v. Brooks*, 80 Ala. 26; *Steverson v. Allison*, 123 Ala. 439; *Hayes v. Lemoyne*, *supra*. Without filing the requisite notice, adverse holding could not ripen into

[Bowles v. Lowery.]

title after February 11, 1893. Charges 1 and 2 given for plaintiff were erroneous, as was charge 5.—*McCrary v. Jackson L. Co.*, 148 Ala. 247; *Same case*, 168 Ala. 209. The charges were also erroneous because the acts of ownership were over undefined portions of the land and could not constitute in law adverse possession to the whole of the land.—*Powers v. Hatter*, 152 Ala. 636; 157 Ala. 23.

LONDON & FITTS, for appellee. All the evidence that plaintiff contends for, even if admissible and credible, did not prove a legal conveyance of title.—*Bank v. Jones*, 59 Ala. 123; *Florence B. & I. Co. v. Shall*, 107 Ala. 531; *Jackson L. Co. v. McCrary*, 137 Ala. 278; The widow was in possession under her right of quarantine, and entitled to maintain this suit.—Sec. 3824, Code 1907. The acts of distinct trespass committed by defendant did not break the continuity of plaintiff's holdings.—*Bell v. Denson*, 56 Ala. 499; *Ladd v. Durbroca*, 61 Ala. 25; *Iron Co. v. Robinson*, 87 Ala. 436; 1 Cyc. 1010. The parol gift of this 40 acres of land to the elder Lowery was a sufficient definition of the extent of the subsequent holdings.—*Collins v. Johnson*, 57 Ala. 304; *Alexander v. Wheeler*, 78 Ala. 167; *Davis v. Davis*, 10 South. 70. Both plaintiff and defendant are claiming as purchasers and by inheritance, and hence, section 1541, Code 1896, is without application. A juror cannot be heard to impeach his own verdict.—*Clay's Case*, 102 Ala. 297.

MCCLELLAN, J.—Statutory ejectment, by appellee against appellant. The tract sued for contains 40 acres, described by government subcall of that area. The plaintiff's assertion of right to the land is rested solely upon adverse possession, through the right of her hus-

[Bowles v. Lowery:]

hand (since deceased), without any color of title being shown. Indeed, she testified: "I never had any kind of deed to this land from my sons or from my husband, or from any one else. My husband (deceased) never had any deed that I knew of. I never bought it from any one."

The evidence referring to, or descriptive of, a letter received by plaintiff's husband from one Robinson, who, plaintiff claims and testified, owned the land about 1871, but who was not otherwise shown to have any title thereto, does not tend, in any degree, to show that the husband ever had any color of title to the land in question. Color of title is a writing which in appearance purports to transmit title, or the right of possession, but which in reality does not.—2 Ency. L. & P., pp. 503-506; *Clements v. Hays*, 76 Ala. 280; *Henry v. Brown*, 143 Ala. 446, 39 South. 325.

In such state of the right asserted, the lead to a recovery is restricted to the area actually occupied by the adverse claimant, or those through whom he claims.—*Black v. Tenn. Co.*, 93 Ala. 109, 9 South. 537, among others. When the recovery is thus restricted (unaided by a bona fide claim under color of title, inheritance, or purchase), it is essential that the evidence afford data from which the actual possession of a definite, particular area may be ascertained. It cannot be left to speculation or conjecture.—*McDaniel v. Tenn. Co.*, 153 Ala. 493, 45 South. 159; *Chastang v. Chastang*, 141 Ala. 451, 459, 37 South. 799, 109 Am. St. Rep. 45.

The evidence here has been carefully examined with reference to this principle, and the conclusion it requires cannot be distinguished, in substance, from that prevailing, on a very similar state of fact, in *McDaniel v. Tenn. Co.*, *supra*. There are indicia of actual possession of a part or parts of the 40, but there is an absence

[Bowles v. Lowery.]

of evidence from which the jury could have found the *possessio pedis* of a definite, particular piece or area within that sued for. A very small part of the 40 was cleared. The other was wood land. The occupancy about the spring may have been of "3 acres" inclosed, but the evidence does not indicate, in any fashion, the particular form of this fractional (of the 40) area, or with certainty where it lay with reference to the other part of the 40. To undertake to lay the line of this "3 acres" by the evidence would be wholly vain. The cutting of firewood, etc., from the 40 is not shown to have substantially covered, in the operations, the entire 40. When it is considered that the husband of plaintiff owned six other 40's, some of which attinged this one in question on at least two sides, and that there was extreme uncertainty as to the knowledge of plaintiff and of her witnesses of the exact lines bounding the 40 in question, it is clear the evidence is insufficient to afford any basis for a particular finding of the definite area actually occupied (if so) by the plaintiff or by those through whom she would trace her right. On this account the defendant was entitled to the affirmative charge requested by him.

If plaintiff's husband had acquired title to the 40, or any definite part of it, by adverse possession previous to his demise, the plaintiff as his widow, would be entitled to maintain ejectment for such lands, provided they were so related to the place of his last residence as to make them the subject of the widow's quarantine right.—*Clancy v. Stephens*, 92 Ala. 577, 9 South. 522, 524; *Callahan v. Nelson*, 128 Ala. 671, 29 South. 535; *Hays v. Lemoine*, 156 Ala. 465, 47 South. 97; 18 Cyc. 378. According to the undisputed evidence admitted on the trial, the 40 in question was entered, in 1858, by one Jett Traweck; that John Bowles, the father of the de-

[Bowles v. Lowery.]

feudant, bought the 40 from Traweek in 1860; that Jett Traweek made a deed to John Bowles to said 40, which his widow (Frances C. Bowles) had seen; that this deed was acknowledged before Berry, a justice of the peace; that said deed, which was not recorded, was destroyed about 1880, when John Bowles' home burned; that Berry died some years since; that Frances C. Bowles is the mother of the defendant, and that defendant and Mary J. Berry, J. M. Bowles, Martha C. Harkey, Jeremiah S. Bowles, and Malisa E. Woods were all the children born to Frances C. and John Bowles. It was further shown, without dispute, that John Bowles went into possession in 1860 of the 40 under this deed from Traweek. The defendant offered in evidence a deed to defendant, describing the 40 in controversy, purporting to have been executed November 20, 1893, by the widow of John Bowles (Frances C.) and the several children, brothers and sisters of defendant, above named. On the theory that this instrument was without acknowledgment by any of its signors except Frances C., the plaintiff taking the objection, the "court allowed the introduction of said deed as evidence of color of title merely, and not as conveying the legal title." The acknowledgment, which appears to immediately follow the signature on the instrument, is in the following words: "The State of Alabama, Fayette County, I, Henry Brasher, a Justice of the Peace, hereby certify that Frances C. Bowles her heirs whose names is signed to the foregoing conveyance, and who is known to me acknowledged before me this day, that being informed of the contents of this conveyance they executed the same voluntarily on the day the same bears date. Given under my hand, this 20 day of November, 1893. Henry Brasher (J. P.)."

[Bowles v. Lowery.]

The names of those purporting to be grantors are not set out in the body of the instrument. The pronoun "me" is employed in the acknowledgment of the receipt of payment of the consideration, viz., \$1, and the pronoun "I" is employed in the granting clause, as well as with respect to the warranty, etc., feature of the instrument. According to the accepted principles and authority of *Madden v. Floyd*, 69 Ala. 221; *Dinkins v. Latham*, 154 Ala. 100, 45 South. 60, and *S.-S. S. & I. Co. v. Lollar*, 170 Ala. 239, 54 South. 279, among others, the identity of the persons purporting to grant and convey in this instance is clear and certain. They were and are those whose names appear at the appropriate place for the execution of such instruments.

Now as to the acknowledgment. Literal compliance with the form provided for that purpose is not exacted. Substantial compliance is required. The intent in the construction of acknowledgments is to the liberal, not the rigid, though in so doing the courts will not disregard the substantial requirements of the statutes. And in construing an acknowledgment, it will be read in connection with the deed and the deed in connection with it.—*Sharpe v. Orme*, 61 Ala. 263; *Davis v. Gerson*, 153 Ala. 503, 45 South. 587; *Leech v. Karthaus*, 141 Ala. 509, 37 South. 696; *Frederick v. Wilcox*, 119 Ala. 355, 24 South. 582, 72 Am. St. Rep. 925; 1 Ency. L. & P. pp. 878, 881-886; 1 Cyc. pp. 581-584.

If, without resort to mere inference or conjecture, what was intended to be expressed can be clearly seen, errors of a purely clerical or grammatical nature will not avoid the certificate.—1 Ency. L. & P. pp. 885, 886, and notes; 1 Am. & Eng. Ency. Law, pp. 547 et seq.; 1 Cyc., pp. 582-584.

Aside from the grammatical mistake evinced in this acknowledgment, by the use of "is" when "are" was

[Bowles v. Lowery.]

the verb the context required, it is evident that the point of objection taken to the certificate, and sustained by the ruling of the court, was that it did not show who, other than Frances C. Bowles, were acknowledgors of the instrument; that the others, who purported to be grantors, were not shown by the certificate to have made acknowledgments of their execution of the instrument. There can be no doubt that it is essential that such a certificate show who acknowledged the instrument of which the certificate is a part. The solution of the controlling question in this connection must be had by a construction, in this respect, of the certificate. The question, in one respect, is similar in principle to that elaborately considered and decided in *Doe ex dem. Hughes v. Wilkinson*, 25 Ala. 453. Under that authority evidence was admissible, and of course, in consequence, to be considered in the premises, to the effect that the persons, other than Frances C. Bowles, whose names appear as signors of the instrument of November 20, 1893, were all of the children, except J. L. Bowles, to whom it reads, born to John Bowles (then deceased) and Frances C. Bowles. In the light of this explanatory fact the words "her heirs," appearing in the certificate of acknowledgement, describe the children of that union, and "her heirs" is to be referred, and refers, to those persons signing the instrument, who were children of John and Frances C. Bowles.—*S.-S. S. & I. Co. v. Lollar*, 170 Ala. 239, 247, 54 South. 272. Such evidence, leading legitimately to that result, is in aid of interpretation, and does not impinge the rule against the admissibility of direct parol evidence to show intention.—35 Ala., pp. 462-466. When the certificate is so interpreted it is evident that its only fault, in the pertinent particular, lies in the omission of the conjunctive "and" between "Bowles" and "her." Manifestly such an omission,

[Bowles v. Lowery.]

clearly clerical, should not be accorded the effect to destroy the certificate and defeat the conveyance to a major degree, notwithstanding a view and consideration, which must be taken, of the instrument proper, of its signors and of their relation to Frances C. Bowles and to John Bowles, and of the use of the plural names and the certification that "they" executed the same voluntarily.

The reasoning of the New York Court, in *Smith v. Boyd*, 101 N. Y. 472, 5 N. E. 319, touching a matter involving a similar principle, may be read with profit in this connection. *Threadgill v. Bickerstaff*, 7 Tex. Civ. App. 406, 26 S. W. 739, pertains to acknowledgments of a materially different verbiage from that under consideration.

Our conclusion, on this matter, is therefore that the conveyance of November 20, 1893, to J. L. Bowles was valid, and transmitted to the grantees such title as was then vested in the grantors in that conveyance.

So on this transcript it must be ruled that defendant possessed title to the 40 in question, unless plaintiff's husband had acquired, by adverse possession, title to the 40 or to a part thereof. Charges 2 and 7 were hence erroneously given upon plaintiff's request.

Since the plaintiff's right to the possession (if so) is not sought to be predicated of the conditions set down in Code (1896), section 1541 (act approved February 11, 1893), [Laws 1892-93, p. 478], that statute applies to her claim of title by adverse possession; and, if adverse possession was not perfected before the act of 1893 became effective, and, if there was no written declaration filed as that act required, she was restricted to proof of a perfected adverse possession prior to the going into effect of the act of 1893.—*Bowling v. M. & M. Ry. Co.*, 128 Ala. 550, 29 South. 584; *Brasher v.*

[Howard v. Martin.]

Shelby Iron Co., 144 Ala. 659, 40 South. 80. Charges 6 and 9 were in consequence erroneously given upon plaintiff's request.

Charge 1 was erroneously given at plaintiff's instance. When referred to the evidence, as must be done, it was manifestly calculated to mislead the jury. It omitted to hypothesize that the possession was exclusive. The fact that actual possession was hypothesized did not so minimize the misleading character of the charge as to avoid affirmative error and put the defendant to an explanatory instruction. Actual possession, continuous and under claim of right or claim of ownership, for 25 or 30 years is still not adverse possession unless it is exclusive.

The judgment is reversed, and the cause is remanded.

Reversed and remanded. All the Justices concur, except DOWDELL, C. J., not sitting.

Howard v. Martin.

Ejectment.

(Decided April 10, 1913. 62 South. 99.)

1. *Ejectment; Pleading; Demurrer.*—A plea disclaiming possession in part of the premises sued for, in that "he disclaimed possession of that part of the land sued for easterly of plaintiff's fence, and as to all of the remainder of the premises sued for defendant says he is not guilty," was demurrable in attempting to disclaim as to part of the premises not described with sufficient certainty, and in pleading not guilty as to the remainder, which rendered both the disclaimer and the general issue uncertain.

2. *Same; Disclaimer; Issue.*—A disclaimer in ejectment is not strictly a pleading, and a plaintiff cannot be required to take issue thereon though he may do so if he desires, and as to the land disclaimed he may take judgment without costs, hence, it is essential that the disclaimer be certain.

3. *Same; Inconsistent Pleas.*—Pleas of disclaimer in ejectment and of denial of possession are incompatible defenses, and cannot be pleaded together.

[Howard v. Martin.]

4. *Adverse Possession; Notice; Statutes.*—Where a defendant claims the land both under color of title and as a bona fide purchaser, the statute of registration of adverse claim is without application.

APPEAL from Birmingham City Court.

Heard before Hon. C. C. NESMITH.

Ejectment by William M. Martin against J. M. Howard. Judgment for defendant and plaintiff appeals. Reversed and remanded.

HARSH, BEDDOW & FITTS, for appellant. The court was in error in sustaining demurrers to the pleas.—*Rayburn v. Elrod*, 43 Ala. 700; *Sims v. Thompson*, 30 Ala. 158; 15 Cyc. 98. Assignments 3, 4, 5, 6, 7, and 8 deal with the introduction of the papers in the chancery case, and they fail to show adverse possession, and although the Register would swear that the papers were out of his office, all this lacks much of proving a valid judicial proceeding by which plaintiff legally acquired rights and titles to the land sued for. The paper purporting to be a lease was improperly admitted.—*Jones on Evid.*, secs. 526, 531-2. A plaintiff must recover on the strength of his own title, or at least on his own prior possession, and this demonstrates that assignments 21, 22, 23, 24 and 25 are sustained.—*Stevens v. Moore*, 116 Ala. 397. The statute is not involved which requires notice of adverse claim, as both parties claim under color of title and as bona fide purchasers. Counsel discuss other assignments of error, but without citation of authority.

A. & F. B. LATADY, for appellee. Where the occupation is without intent on the part of the occupant to claim as his own, land which does not belong to him, but claims only to the true line whatever that may be the holding is not adverse.—*Brown v. Cockerell*, 33

[Howard v. Martin.]

Ala. 45; *Alexander v. Wheeler*, 89 Ala. 172; *Davis v. Caldwell*, 107 Ala. 530; *Taylor v. Fomby*, 116 Ala. 626. In the light of this doctrine the testimony of the appellant is conclusive against his claim.—*Elyton L. Co. v. Denny*, 108 Ala. 553; *Eureka Co. v. Noment*, 104 Ala. 625.

MAYFIELD, J.—This action is the statutory one in the nature of ejectment. The defendant interposed a plea to which a demurrer was sustained. The plea was as follows: "No. 1. Comes defendant and disclaims possession in part of the premises sued for, viz., he disclaims possession of that part of the land sued for easterly of plaintiff's fence, and as to all the remainder of the premises sued for defendant says he is not guilty." The plea is a hybrid; it attempts to disclaim as to a part of the premises, which it fails to describe with sufficient certainty, and pleads not guilty as to the remainder, and this, of course, results in making the latter portion uncertain. If the defendant had a fence extending north and south, across the premises in dispute, and had but one fence of that kind, he might disclaim as to that part of the land east of the fence and plead not guilty as to the remainder, as he attempted to do by this plea; but the plea is lacking in these or similar allegations necessary to make certain the part as to which it disclaimed, and for this reason it was insufficient.

A disclaimer, however, strictly and accurately speaking, is not pleading; the plaintiff cannot be required to take issue upon it. As to the lands disclaimed, he may, if he desire, take judgment therefor, without costs; but he can take issue thereon if he desire. For this reason it is necessary that the plaintiff be certainly informed as to the part which the defendant disclaims possession

[Howard v. Martin.]

of, as well as so informed touching the part as to which he admits possession but denies title. These difficulties and uncertainties, in our system of pleading in actions of ejectment, were pointed out by STONE, C. J., in the case of *McQueen v. Lampley*, 74 Ala. 408, 410, 411, where it was said:

“Disclaimer, or denial of possession, would have put in issue the question, and only the question, of possession. The former is an admission of defendant’s possession, with denial of plaintiff’s title; the latter an admission of plaintiff’s title, with denial of defendant’s possession. They are incompatible defenses and cannot be pleaded together.—*Bernstein v. Humes*, 60 Ala. 582 [31 Am. Rep. 52].”

“We submit if there should not be some change of the statute on this subject. Should not a defendant, in a case like the present, have equal right with the plaintiff, who brings him into court, to so plead as to put the question of boundary in issue and have the jury pass upon it? The plaintiff, by controverting the disclaimer and averring the defendant was in possession when the suit was brought, may have a verdict and judgment on the question of boundary. He may, however, decline to do so and thus leave the controversy in such form as to invite other suits.”

To meet this deficiency, the statute on the subject (section 3843 of the Code) has been amended and now reads as follows: “The defendant may, in an action of ejectment, or in an action in the nature of ejectment, disclaim possession of the premises sued for, in whole or in part, and upon such disclaimer the plaintiff may take issue; and, if the issue be found for him, he is entitled to judgment as if the defendant had, in an action of ejectment, entered into the consent rule, confessing possession as well as lease, entry and ouster, or,

[Howard v. Martin.]

in an action in the nature of an action of ejectment, had pleaded 'not guilty,' admitting possession. The defendant in his disclaimer may suggest to the court that the suit arises over a disputed boundary line, and thereupon the court shall make up an issue and submit to the jury the question of the true location of the line, and shall render judgment accordingly and order the sheriff to establish and mark the true line, found by the jury, and in such case, apportion the costs justly and equitably."

Following the above Code provision the defendant (appellant here) suggested that the suit arose over a disputed boundary line; but the court, so far as the record proper shows, failed to make up an issue on this suggestion as the statute directs, but the case was tried on defendant's third plea of disclaimer, which disclaimed as to all the land sued for which was west of a survey made by one Wheeler, and pleaded not guilty as to the remainder. The bill of exceptions, however, indicates that the court did make up an issue on this suggestion, and that the trial was had on this issue as to the true boundary line, and not merely on the disclaimer, which was only as to whether or not the Wheeler survey was the true boundary line. In fact, the verdict of the jury, the charge of the court, and the evidence show that the issues litigated were the true boundary line and whether or not plaintiff had been in the adverse possession of the strip of land in dispute for ten years or for three years so as to make good his suggestion of such possession as is authorized by section 3846 et seq. of the Code.

There was a great deal of evidence introduced by both parties as to the true boundary line between the lands of plaintiff and defendant. That of the plaintiff tended to show, if it did not show, that the true line was that established by the survey known or described as the

[Howard v. Martin.]

Salter survey, while that of the defendant tended to show that the other survey, known as the Wheeler survey, disclosed the true line. These two lines were parallel and were 320 feet apart, running north and south, for a quarter of a mile, across the 40-acre tract in dispute. It is therefore made to clearly appear that the only question in dispute was, which of the two contending parties owned this land or strip of land? and, if the plaintiff owned it, whether the defendant had been in the adverse possession of it for three years, so as to be entitled to the value of his permanent improvements placed thereon, as provided by our statute on that subject, above referred to.

The trial court, at the request of the plaintiff, instructed the jury as follows:

“(1) I charge you, gentlemen of the jury, that the acts of dominion and ownership proved by the defendant over the strip of land lying between the line called the Wheeler line and the eastern boundary of the land described in the complaint do not constitute adverse possession of that strip of land, and you will find for the plaintiff under the suggestion of the record of adverse possession for three years.”

“(2) I charge you, gentlemen of the jury, that if you believe the evidence in this cause you will find for the plaintiff for the strip of land lying between the Wheeler line testified to in the cause and the eastern boundary of the land described in the complaint under the plea of not guilty thereto.”

“(3) I charge you, gentlemen of the jury, that there is no conflict in the evidence as to the true eastern boundary of the tract sued for, and that the Salter line, as located by the county surveyor, is the true line of the eastern boundary of the tract sued for, and that under the issues made up by the court under the suggestion

[Howard v. Martin.]

of disputed boundary made by defendant in his disclaimer, if you believe the evidence of Salter, you will find and return the line recently located by Mr. Salter, the county surveyor, to be the true location of the line between the plaintiff and the defendant."

The trial court refused to the defendant the following charges:

"(1) It is for the jury to determine from the evidence in this case whether or not defendant had open, notorious, continuous, and adverse possession of the land sued for, and not disclaimed, for ten years before the filing of this suit."

"(2) It is for the jury to determine from the evidence in this case whether or not defendant had open, notorious, adverse, and continuous possession of the land sued for, and not disclaimed, for three years before the filing of this suit."

"(3) It is for the jury to determine in this case from the evidence whether defendant is in the possession of any part of the land sued for, to the possession of which plaintiff is entitled."

"(4) It is for the jury to determine in this case from the evidence in this case whether or not defendant's suggestion of adverse possession for three years is true."

"(5) If the jury find from the evidence in this case that defendant's suggestion of adverse possession of three years is true, then it will be the duty of the jury to ascertain from the evidence the value of the permanent improvements, if any, made by defendant upon the land."

"(6) I charge you that under the pleadings and evidence in this case, if you believe the evidence, defendant's suggestion of adverse possession is true."

It therefore appears that the trial court in effect directed a verdict for the plaintiff as to all the issues.

[Howard v. Martin.]

In this we think there was error to reverse. The evidence has been carefully examined, and we are of the opinion that there was sufficient evidence to carry all these questions to the jury.

The trial court also erred in excluding all the defendant's evidence, which tended to show adverse possession of this strip of land in question, upon the theory that he had filed no declaration of his intention to so claim such strip. The statute requiring the filing of such written declaration of claim of adverse possession, as it appeared in the Code of 1896, or in that of 1907, does not embrace such a claim as that which the defendant asserts in this case. He claims this land, both under color of title and as a bona fide purchaser; and for this reason the statute in question did not apply to or embrace his claim by its very terms and in its very spirit. This error in excluding all this part of defendant's evidence probably swayed the court in practically directing verdict for the plaintiff upon all the issues, and induced some other errors in rulings upon questions as to evidence. We do not mean to intimate any opinion as to the weight or sufficiency of the defendant's evidence touching adverse possession to carry the questions to the jury.

There are other assignments of error; but as the case must be reversed, and such other questions will probably not arise on another trial, it is unnecessary to notice them.

Reversed and remanded. All the Justices concur, except DOWDELL, C. J., not sitting.

[B'ham Coal & I. Co. v. Doe, ex dem. Arnett.]

B'ham Coal & I. Co. v. Doe, ex dem. Arnett.

Ejectment.

(Decided April 17, 1913. Rehearing denied May 8, 1913.
62 South. 26.)

1. *Public Lands; Disposition of Title; Power of State.*—The state cannot make laws disposing of title to the public lands belonging to the Federal Government, or laws by which a patent of the United States may be impeached or avoided.

2. *Same; Title; Legal and Equitable.*—Title to public lands remains in the Federal Government until a patent is issued, although the purchase money is paid; the payment of the purchase price, however, vests the equitable title in the purchaser, and the government has only the bare, legal title in trust for the purchaser, and, except as against the United States and those claiming under it, the state may attach to such equity such incidents and qualities of property as it pleases, and may render a final certificate of payment evidence of title in the holder sufficient to maintain or defeat an action for possession as is done by section 3980, Code 1907, unless an adversary title is shown by a patent issued to another.

3. *Same; Patents; Entry.*—A patent to public lands relates back to the date of entry, and the title acquired by the patent inures to the benefit of the patentee's prior grantee, though by quit claim or involuntary conveyance; so, where the commutation payment for public lands was made for the benefit of infant heirs of a deceased entryman, and they received a certificate of final payment and became entitled to a patent, the title acquired by the patent subsequently issued related back to the date of the certificate and inured to the benefit of a purchaser at a sale by a guardian of the heirs pursuant to a proper order of court.

4. *Guardian and Ward; Subsequent Marriage of Guardian; Effect.*—Where a single woman was appointed guardian of a ward, her subsequent marriage did not ipso facto terminate her guardianship, though it was necessary that her husband assent to the continuance of the guardianship.

5. *Infants; Sale by Guardian; Collateral Attack.*—Where a single woman was appointed guardian of an infant, subsequently married, and after her marriage petitioned for a sale of the real estate belonging to her ward, and the court entered an order of sale, and the sale was made and confirmed, such sale was not subject to collateral attack.

APPEAL from Jefferson Circuit Court.

Heard before Hon. JOHN C. PUGH.

[B'ham Coal & I. Co. v. Doe, ex dem. Arnett.]

Common-law ejectment by William Arnett against the Birmingham Coal & Iron Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

The special finding of facts, to summarize, is that the plaintiff and his brother were the heirs at law of John W. Arnett, deceased, and that they are the sole heirs. That in his lifetime John W. Arnett entered the land sued, for, but no patent was issued until after his death, when on January 11, 1892, the United States government issued patents to his heirs for the lands which he had entered, which were the lands sued for. That plaintiff was born January 15, 1886, and that his mother, who intermarried with one crumley, was appointed his guardian by the probate court, and that she petitioned for a sale of said land in July, 1891, and that the lands were sold in the same year under an order of the probate court, but before the issuance of the patent. The said lands were sold and conveyed by the guardian, who was not joined therein by her husband, and were purchased by Sarah A. Echols and B. W. May in August, 1891, and deed was executed to them soon thereafter, but before patent was issued; thereupon the court finds that although the deed from the guardian to May and Echols, and the deeds from them to the Birmingham Coal & Iron Company, were regular on their face and sufficient to convey title, yet no legal title was conveyed by the deed from the guardian, as the title was then in the United States, and did not pass to the wards, and therefore could not be conveyed by their guardian.

PERCY, BENNERS & BURR, for appellant. Title to real estate is regulated, governed and established by the *lex rei sitæ*.—*Sloan v. Frothingham*, 65 Ala. 593; *Keith v. Proctor*, 114 Ala. 676; *Kerr v. Moon*, 9 Wheat. 565. The

[B'ham Coal & I. Co. v. Doe, ex dem. Arnett.]

Legislature has authority to prescribe what character of interests are necessary to convey title, and have done so by section 3980, Code 1907. Under this statute the final receipt or certificate vested title in the heir of John W. Arnett, and authorized them to maintain ejectment.—*Case v. Edgeworth*, 87 Ala. 204; *Bullock v. Wilson*, 12 Port. 436; *Morrison v. Coleman*, 87 Ala. 655; *Tillson v. Ewing*, 91 Ala. 467; *Smart v. Kennedy*, 123 Ala. 627; *Ledbetter v. Borland*, 128 Ala. 418; *Price v. Dennis*, 159 Ala. 625. The patent relates back to the issuance of the certificate, and conveys title as of that date unless title has already been conveyed by a previous patent.—200 U. S. 321; *T. C. & I. R. R. Co. v. Tutwiler*, 108 Ala. 483; *Stringfellow v. T. C. I. & R. R. Co.*, 117 Ala. 250. The sale was in all respects regular on its face and cannot, therefore, be the subject of collateral attack.

ALLEN & BELL, and R. D. COFFMAN, for appellee. The holder of the fee in ejectment must recover.—*Claraday v. Abraham*, 56 South. 720; *Neville v. Cheshire*, 163 Ala. 390; *Stone v. Robinson*, 118 Ala. 273; *Mobile T. Co. v. City of Mobile*, 128 Ala. 350; *Mylam v. Coley*, 144 Ala. 535; *Nunnally v. Barnes*, 139 Ala. 657; *Hodges v. Hodges*, 54 South. 618; *Masters v. Eastis*, 3 Port. 368; 66 U. S. 50; 16 U. S. 372. A patent is the highest evidence of fee and must prevail over any other description of title, and the Legislature has neither the power nor the intention to make any other class of title effective or conclusive.—*Knabe v. Burden*, 88 Ala. 436; 13 Peters 498; Tiedman on Real Property, sec. 746. The patent carries with it the fee and it was intended by Congress to pass the legal title.—*Lowery v. Baker*, 141 Ala. 600; *Price v. Dennis*, 49 South. 248; *T. C. & I. Co. v. Tutwiler*, 108 Ala. 485; 11 Wheat. 334; *Stringfellow*

[*B'ham Coal & I. Co. v. Doe, ex dem. Arnett.*]

v. T. C. I. & R. R. Co., 117 Ala. 250, and cases cited. The doctrine of relation does not apply in cases of this kind.—54 South. 588; *Tillson v. Kennedy*, 5 Ala. 407; 11 How. 703; *Price v. Dennis, supra*; *Garrow v. Tozey*, 54 South. 556; *Gonzales v. Hukil*, 49 Ala. 260; *Vary v. Smith*, 162 Ala. 459. If the doctrine of relation be applicable in this case the court is bound by its former decisions.—*Morton & Bliss v. N. O. S. R. R. Co.*, 79 Ala. 590; *Snyder v. Burke*, 84 Ala. 53; *Gulf R. C. F. Co. v. O'Neal*, 131 Ala. 117. The purchaser at the guardian sale was not a bona fide purchaser, got all he paid for, and ought not now to complain as all the title he got was an equity.—Sec. 4426, Code 1907; *Masters v. Eastis, supra*; *Price v. Dennis, supra*; *Burkett v. Mumford*, 70 Ala. 423; 12 Wall. 362; *Shorter v. Frazer*, 64 Ala. 81; *Wood v. Holley*, 100 Ala. 351; *Smith v. Perry*, 56 Ala. 268; *McMillan v. Rushing*, 80 Ala. 402; *O'Neal v. Seixas*, 85 Ala. 80.

SAYRE, J.—This is an action of ejectment in which the appellee recovered judgment against the appellant. A general statement of the facts may be seen in the special finding made by the trial court on request of the parties, and which appears in the record.

The Legislature of a state is incompetent to make laws disposing of the title to the public lands of the United States, or laws by which a patent of the general government may be impeached or avoided.—*Wood v. Pittman*, 113 Ala. 207, 20 South. 972. Until a patent issues, the legal title remains in the United States, and this although the purchase money be paid in full.—*Knabe v. Burden*, 88 Ala. 436, 7 South. 92. But the payment of purchase money in full vests a perfect equity in the purchaser, leaving in the general government no more than a bare, technical legal title, held in

[B'ham Coal & I. Co. v. Doe, ex dem. Arnett.]

trust for the purchaser, and to this equity, except as against the United States and those claiming under it, the state may attach what incidents and qualities of property it pleases. Section 3980 of the Code makes the certificate of final payment issued from the Land Office of the United States evidence of title in the holder sufficient to maintain or defeat an action for the possession unless an adversary title be shown by patent issued to another. This is the effect of the cases cited in brief for appellee. If, therefore, the contest here were between the appellant and a stranger to the proceeding in the probate court holding a patent, the latter would prevail.

But a different principle must control the conclusion in this case. Appellee, having, through the agency of the probate court, disposed of the right which his ancestor at law had acquired by final payment and receipt of the Land Office certificate to that effect, undertakes now to defeat that disposition by showing a patent subsequently issued to him. He is embarrassed by no covenants of warranty. He is in the same position as if he had executed a quitclaim of the interest shown at the time by his ancestor's certificate. The precise question thus presented does not seem to have occurred heretofore in this state, but it has been well settled nevertheless. The patent under which appellee claims discloses the fact that it was issued as final evidence of the same purchase which had theretofore been evidenced by the certificate issued to his ancestor at law. He was not a stranger to the title conveyed by the probate court proceeding. "In the case of sales made by the United States, the law gives the right, and the patent may be considered, not as the title itself, but as the evidence by which it is shown that the prerequisites to a legal sale have been complied with."—*Goodlet v. Smith*—

[B'ham Coal & I. Co. v. Doe, ex dem. Arnett.]

son, 5 Port. 245, 30 Am. Dec. 561. Technically the fee, prior to the issuance of the patent, was in the United States; but for every equitable and legal purpose the interest acquired by appellee's ancestor at law was realty in his hands and descended as such to his heirs.—*Carroll v. Safford*, 3 How. (U. S.) 441, 11 L. Ed. 671. The recitals of the patent show the consideration upon which it issued to have been the payment of purchase money by appellee's ancestor at law, and thereby "that it was the execution of a trust in his favor, so far as the same could be executed after his death, by transferring to his heirs the naked legal title to lands which he had fully appropriated and for which he was in his lifetime entitled to a patent, * * * and vested in them no greater or other estate than their ancestor would have taken had the patent issued in his lifetime." *Bond v. Swearingen*, 1 Ohio, 395. The patent invested appellee with no new or additional property in the land; it only gave him better and conclusive evidence of the title which his ancestor at law had acquired by the certificate issued to him.—*Cavender v. Smith*, 3 G. Greene (Iowa) 349, 56 Am. Dec. 541. But there is no need to pursue the subject further. All the courts agree that the patent in a case such as that here presented, by fiction of law, adopted that justice may be worked out, relates back to the date of entry, takes date with it, and the title so acquired inures to the benefit of the patentee's previous grantee though by quitclaim or involuntary conveyance. The entry and patent are regarded as one title.—*Ross v. Barland*, 1 Pet. 655, 7 L. Ed. 302; *French v. Spencer*, 21 How. 228, 16 L. Ed. 97; *United States v. Detroit Timber Co.*, 200 U. S. 321, 26 Sup. Ct. 282, 50 L. Ed. 499; *Pac. Coast Co. v. Spargo* (C. C.) 16 Fed. 348; *Coleman v. Peshtigo Lumber Co.* (C. C.) 30 Fed. 317; *Fisher v. Hallock*, 50 Mich. 463, 15 N. W. 552; *Magruder v.*

[B'ham Coal & I. Co. v. Doe, ex dem. Arnett.]

Esmay, 35 Ohio St. 221; *Hammond v. Johnston*, 93 Mo. 211, 6 S. W. 83; *Steinspring v. Bennett*, 16 La. Ann. 201; *Gallup v. Armstrong*, 22 Cal. 481; *Steeple v. Downing*, 60 Ind. 478.

One other point is made in favor of the judgment below. Appellee's mother, Sarah J. Arnett, was appointed and qualified as his guardian. Subsequently Sarah J. Crumley filed her petition as guardian for appellee to have the land in question sold for his maintenance and support. The proceeding resulted in the sale under which appellant claims. In its special finding the trial court states that Mrs. Arnett had married Crumley in the interval between her appointment as guardian and the filing of the petition. This fact did not appear in the evidence, nor does it appear what else may have happened. It is of no consequence in this proceeding. For aught appearing, the proceeding in the probate court may have been essentially correct, and upon collateral attack the presumption must be indulged that it was. If at the time of filing the petition the guardian had changed her name, in whatever way or for whatever cause, the change should have been stated in the petition for the sake of formal regularity. And if she were then a married woman, and if it be conceded that her second husband's assent to the continuance of the guardianship was indispensable, her subsequent marriage did not ipso facto terminate her guardianship, and his assent must be presumed.—*Carlisle v. Tuttle*, 30 Ala. 623. If the petition was filed and the proceeding prosecuted by the guardian, as for aught appearing was the case, the court had jurisdiction. The court knew its own records and had the parties before it. Its decrees affirm that Sarah J. Crumley was guardian for the appellee. Such being the case, the decree rendered and the sale had under it, however irregular, are beyond col-

[B'ham Coal & I. Co. v. Doe, ex dem. Arnett.]

lateral attack.—*Bland v. Bowie*, 53 Ala. 152; *King v. Kent*, 29 Ala. 542.

The judgment will be reversed and the cause remanded. If the evidence remains without substantial change, the court below will give judgment on a second trial for the defendant.

Reversed and remanded. All the Justices concur, except DOWDELL, C. J., not sitting.

ON REHEARING.

SAYRE, J.—The finding of facts made by the judge below left it uncertain as to when and by whom the commutation payment was made on the entry which had been made by appellee's ancestor at law. In preparing the original opinion we acted upon the idea that the final payment had been made by the entryman from whom appellee inherited. Now it appears that the payment was made by the appellee and his brother while they were minors or, more probably, by their guardian for them. But the payment, by whomsoever made, was for their benefit, and they later received a patent on consideration of the original entry and the commutation payment. The payment was made about two years prior to the proceeding for the sale of the land in the probate court. At that time they received the certificate and at that time they became entitled to receive a patent in due course. To that time, according to the cases we have cited, the title acquired by the subsequent patent related. Such being the case, the principle stated in the opinion and supported by numerous authorities is applicable to the title received by them in like manner as if their ancestor had made the payment. There are no authorities to the contrary in this state. The application for a rehearing and for an affirmance must be denied.

[Cannon v. Prude.]

Cannon v. Prude.*Ejectment.*

(Decided January 23, 1913. Rehearing denied May 8, 1913.
62 South. 24.)

1. *Appeal and Error; Review; Directed Verdict.*—In considering whether plaintiff was entitled to the affirmative charge the appellate court will consider only the phases of the evidence and its tendencies which are favorable to defendant, and in doing so, the court will treat as having been admitted certain evidence which was excluded but which should have been admitted.

2. *Adverse Possession; Vendor and Purchaser; Payment.*—The occupancy of a person in possession of the property who has fully paid the purchase money is a possession adverse to the vendor.

3. *Same; Jury Question.*—The evidence examined and held sufficient to take to the jury the question of adverse possession of defendant and his predecessors in title.

4. *Same; Tacking; Administrator.*—When an administrator has the legal right by a statute to take possession and control of his decedent's real estate, and actually does so, the possession of the administrator may be tacked on to the possession of his intestate for the purpose of completing the bar of the statute of limitations.

5. *Same; Trustee in Bankruptcy.*—A bankrupt is civiliter mortuus and the trustee of his estate is his administrator, and hence, the possession of the trustee may be tacked on the possession of the bankrupt to complete the bar of the statutes of limitations.

APPEAL from Fayette Circuit Court.

Heard before Hon. BERNARD HARWOOD.

Ejectment by J. O. Prude, Jr., against W. M. Cannon. Judgment for plaintiff and defendant appeals. Reversed and remanded.

LONDON & FITTS, and CHARLES W. SANDERS, for appellant. A receiver cannot hold adversely, neither can an administrator nor a trustee in bankruptcy, and hence, their holding cannot be tacked for the purpose of completing the bar of the statute.—*Wilkerson v. Lehman-D. & Co.*, 136 Ala. 463; *Scott v. Ware*, 65 Ala. 186;

[Cannon v. Prude.]

Gayle v. Johnson, 80 Ala. 392; 1 High on Receivers 1; 4 Md. 80; 2 Jones on Mortgages sec. 1535.

F. A. GAMBLE, and BANKHEAD & BANKHEAD, for appellee. The defendant wholly failed to make proof of the loss or destruction of the deed, and failed to prove the necessary elements of a deed.—*Hancock v. Kelly*, 81 Ala. 368; *Potts v. Coleman*, 86 Ala. 94; *Branch v. Smith*, 114 Ala. 463; *Thomas Bros. v. Williams*, 54 South. 494. The possession of E. and W. Harkins could not be adverse to the true owner unless the true owners had notice that they renounced possession and were holding adversely to them.—*Hicks v. Swift C. M. Co.*, 133 Ala. 141; *Johns v. Johns*, 93 Ala. 239; *Jones v. Pelham*, 84 Ala. 208. The possession of Wallace as a trustee in bankruptcy was not such as defendant in the court below could tack on to and make the possession continuous.—*Wilkerson v. Lehman-D. Co.*, 136 Ala. 463; *L. & N. v. Philyaw*, 88 Ala. 264; *Riggs v. Fuller*, 54 Ala. 141; *Scotch L. Co. v. Sage*, 132 Ala. 598. The evidence, therefore, fails to show any title, and the court properly directed a verdict.

DE GRAFFENRIED, J.—The plaintiff, Prude, brought this suit against the defendant, Cannon, to recover possession of a certain lot in the town of Fayette, Ala.

At the conclusion of all the evidence the court gave to the jury the affirmative charge in favor of the plaintiff. Thereupon the jury returned a verdict in favor of the plaintiff, a proper judgment followed the verdict, and the defendant appeals.

(1) The plaintiff established, by the deeds which he introduced in evidence, a prima facie right to recover, and, unless there was evidence tending to show that the

[Cannon v. Prude.]

defendant and those through whom he claimed the land had through adverse possession acquired title to the land, the plaintiff was entitled to recover.

Of course, if there was evidence in the case from which the jury had the right to infer that the defendant and those through whom he claimed the land had acquired the legal title thereto by adverse possession, then the plaintiff was not entitled to the general charge which the court gave to the jury in his behalf.

On this subject we will, therefore, consider only the phases of the evidence and its tendencies which are favorable to the defendant. In doing this we will treat as having been admitted certain evidence which was offered and excluded, but which, in our opinion, should have been admitted.

(2) The evidence for the defendant tended to show that about the year 1895 or 1896 "the Odd Fellows made an agreement, through a committee appointed by the lodge, with W. W. Harkins for the lot sued for, for \$40." At that time the Methodist Church was situated in what is known as the old town of Fayette. The lower floor of this church was used by the members of that church for religious purposes, and the upper floor by the Odd Fellows as a lodgeroom. We take it that the Methodist Church and the Odd Fellows each had an interest in the building. About this time the church building was moved from the old town of Fayette and placed upon the lot in controversy. While the building was being moved, the Methodist Church made an agreement with the Odd Fellows, whereby the church agreed to pay one-half of the purchase price of the lot, with the understanding that the church was to own an undivided one-half interest in the lot, and with the further understanding that the Methodist Church and the Odd Fellows were to use the building as they had pre-

[Cannon v. Prude.]

viously done. The church and the Odd Fellows, after the building was moved onto the lot in controversy, used and occupied the building until 1899 or 1900. There is evidence tending to show that before that time the Odd Fellows had paid their half of the purchase price of the lot, because a witness, G. T. Hassell, testified that to the best of his recollection "he and one or two others, as a committee from the Odd Fellows Lodge, had gone to W. W. Harkins and asked him to make the Odd Fellows a deed to the lot, and made mention of the \$20 having been paid to him by the lodge, and that the said Harkins had declined to make the deed, saying that he did not have his title straight, and could not make a deed until he could clear up some little tangle to the title to the property."

While Harkins denied that the Odd Fellows ever paid him the above \$20, or that he ever sold or agreed to sell to the Odd Fellows said lot, the above-quoted evidence has some tendency, at least, to show that he had agreed to sell the property to the Odd Fellows, and that the Odd Fellows had paid him their half of the purchase money.

There was evidence, also, tending to show that Harkins donated to the Methodist Church the \$20 of the purchase money which was due by the church. A witness testified that W. W. Harkins "had told the pastor of the church at Fayette that the church need not pay him anything, in so far as the church was concerned, for the lot in question. The witness further testified that he did not know whether or not this conversation had taken place in connection with the purchase of this property in controversy by the church from Harkins, or whether it was a conversation with reference to financial affairs of the church."

[Cannon v. Prude.]

This last-quoted testimony not only has some tendency to show that the purchase money due by the church was donated to the church, but it also, taken in connection with the above-quoted testimony of the witness G. T. Hassell, tends to show that the alleged vendor, Harkins, knew that the Methodist Church and the Odd Fellows had, by some agreement made between them, each become the owner of an undivided one-half interest in said lot.

There was therefore evidence in the case tending to show that prior to the year 1899 or 1900 the Odd Fellows and the Methodist Church had, by a payment made by the Odd Fellows and through a donation made by the alleged vendor to the Methodist Church, fully discharged their obligation to pay the vendor anything for the lot; or, in other words, that the purchase money for the lot had been fully paid. It therefore seems to us that there was some evidence in the case tending to show that the Odd Fellows and the Methodist Church, prior to 1899 or 1900, while they were still in the joint occupancy of the property, were in adverse possession of the property.

The occupancy of one in possession of property, who has fully paid to the vendor the purchase money, must, in its very nature, be a possession adverse to the vendor.

(3) The building which was placed upon the lot by the Odd Fellows and the Methodist Church was their building, and there was, as we have above said, evidence tending to show that the lot was paid for by them. About the time that the Odd Fellows and the Methodist Church moved out of the building, E. Max and W. Clyde Harkins, sons of W. W. Harkins, moved into the building and conducted a mercantile business there. On the 11th day of March, 1901, the Odd Fellows, by a quit-claim deed, conveyed their interest in the building to

[Cannon v. Prude.]

them; and, while there is no direct evidence in the record on the subject, we think that the jury, under the circumstances of this case, had a right to infer that E. Max and W. Clyde Harkins moved into the building with the consent of the Odd Fellows and the Methodist Church, and that their possession, prior to the execution of the deed by the Odd Fellows to them on March 11, 1901, was the possession of the Odd Fellows and said Methodist Church.

The assessment records of Fayette county were destroyed by fire in 1911, but the tax assessor testified that to the best of his recollection the property from 1895 or 1896 to about 1900, the period when the church and the Odd Fellows occupied the building, was assessed by no one; that from about 1901 to 1902, the period when the property was occupied by E. Max and Clyde Harkins, the property was assessed by said E. Max and Clyde Harkins; and that, subsequent to that time, the property had been regularly assessed by the defendant alone.

There was evidence tending to show that in May, 1902, the said lot was sold by J. H. Wallace, as trustee in bankruptcy of E. Max and Clyde Harkins, as their property, and that at the sale the defendant bought the lot, went into the immediate possession of the same, and that he has ever since that time been in the adverse possession of the same.

Of course, the tendencies of the plaintiff's evidence were widely divergent from those of the defendant's, and in some instances the divergencies are so wide that they cannot be so reconciled as that both can be made to speak the truth. We have nothing to do with reconciling those divergent tendencies, and we have nothing to do with the weight or credibility of the evidence.

[Cannon v. Prude.]

It seems to us that there was *some* evidence in the case from which the jury had the right, in their province as triers of the facts, to say that the defendant and those through whom he claimed the property had acquired the legal title thereto by adverse possession for a period of 10 years.

It is therefore our opinion that the trial court committed reversible error in giving to the jury the general affirmative charge in favor of the plaintiff.

Reversed and remanded.

DOWDELL, C. J., and ANDERSON and MAYFIELD, JJ.,
concur.

ON APPLICATION FOR REHEARING.

DE GRAFFENRIED, J.—When an administrator has the legal right by statute to take possession and control of his intestate's real estate, and actually does so, the possession of the administrator may be tacked onto the possession of his intestate for the purpose of completing the bar of the statute of limitations.—1 Cyc. p. 1005, subd. 9.

A bankrupt is *civiliter mortuus*. The trustee of his estate is, in fact, his administrator. "It is no new doctrine that the assignee or trustee in bankruptcy stands in the shoes of the bankrupt."—*Security Warehouse Co. v. Hand*, 206 U. S. 415, 27 Sup. Ct. 720, 51 L. Ed. 1117, 11 Ann. Cas. 789. In fact, the authority of a trustee in bankruptcy over, and his duties with reference to, the estate of his bankrupt are fully as broad as are the powers and duties of an administrator, under the statutes of this state, with reference to the real and personal estate of his intestate. Stepping, as he does, into the shoes of the bankrupt, his possession, while held

[Noble, et al. v. Saffold.]

for the benefit of the creditors, is the possession of the bankrupt, and may be tacked onto the possession of the bankrupt for the purpose of completing the bar of the statute of limitations.

The doctrine announced in *Wilkinson v. Lehman-Durr Company*, 136 Ala. 463, 34 South. 216, while perfectly sound as applied to the facts of that case, has no applicability to the facts of the instant case.

The application for a rehearing is overruled.

Noble, et al. v. Saffold.

Ejectment.

(Decided June 12, 1913. Rehearing denied June 30, 1913.)

1. *Adverse Possession; Evidence.*—Deeds under which the evidence showed that actual possession of the land was taken by the grantee are admissible to show good faith in taking and holding possession, even though the description is too uncertain to operate as conveyance of title or to constitute color of title.

2. *Same; Jury Question.*—The evidence examined and held to require a submission to the jury to determine whether defendant's possession was adverse or merely under a claim of ownership to the true boundary line which was uncertain.

APPEAL from Montgomery Circuit Court.

Heard before Hon. W. W. PEARSON.

Ejectment by W. A. Saffold against A. S. Noble and others. Judgment for plaintiff and defendant appeals. Reversed and remanded.

FRANK W. LULL, and L. A. SANDERSON, for appellant. Saffold could not claim adverse possession under color of title to three and two-tenth acres east of the tract conveyed by his deed when his deed conveyed only thirty acres.—*Bromberg v. Yonkers*, 108 Ala. 578; *Carlin v.*

[Noble, et al. v. Saffold.]

Wilson, 58 South. 417. This is a controversy between co-terminus owners and the possession is presumably not adverse as to the strip in dispute.—*Taylor v. Fomby*, 116 Ala. 621; *Hess v. Rudder*, 117 Ala. 526; *Hope v. Adams*, 121 Ala. 664. The court was not in error in not permitting the plaintiff to show that the witness Abercrombie had been convicted of a forgery in the circuit court of Montgomery.—Sec. 4009, Code 1907; 131 Ala. 50. Noble was entitled to testify that he went into possession of the land under his deed from Mr. Graves.—102 Ala. 398; 74 Ala. 64. A deed from Tweed to Saffold was not admissible as another was in adverse possession.—*Curtis v. Riddle*, 59 South. 47. Counsel discuss other assignments of error, but without further citation of authority.

BALL & SAMFORD, for appellee. The dispute was over a line between co-terminous owners, and neither can acquire title by adverse possession.—*Walker v. Wyman*, 157 Ala. 478. The defendant cannot claim color of title because it is admitted that his deed described the lands according to government numbers, and that the strip sued for was not included therein.—31 Wis. 146; 68 Wis. 317; 7 Jones 430. Noble's holding was intended to be to the true line, and could not extend beyond that line, and plaintiff ought to recover.—*Davis v. Caldwell*, 107 Ala. 526.

MAYFIELD, J.—The action is statutory ejectment.

The land involved is a narrow strip described as follows: "All that part of the northwest quarter of section nine (9), township sixteen (16), range eighteen, lying north of the Mt. Meigs road and west of the line dividing the east half from the west half of said quarter section and east of an irregular line beginning one

[Noble, et al. v. Saffold.]

hundred and sixty-four feet west of northeast corner of the west half of said quarter running in a southerly direction to a point seventy feet west of said quarter section line on the north side of said Mt. Meigs road (except about twenty feet off the south end thereof now used as the right of way of the Montgomery Light & Traction Company), being now cultivated by said Ray. * * *” The action was brought by appellee against appellant Ray, who was a tenant of Noble, who was made a party defendant as is authorized by statute. The only real dispute between the parties is as to the boundary line.

A great number of deeds were introduced in evidence, some as muniments of title and some as color of title and evidence of bona fide claim of title. The defendant objected to the introduction of a great number of these deeds in evidence chiefly on the ground that they were void for uncertainty in the description of the land attempted to be conveyed, and because they did not describe the land involved in the suit. Some of these were very indefinite and uncertain as to description, but there was evidence tending to show that actual possession of the land in question was taken under these instruments, and that the land in question was actually held and claimed under these deeds; and hence they were admissible to show good faith in the taking and holding of possession thereunder, although the description was too uncertain to operate as muniment of title to the land in question, or to answer as color of title. For this reason, we find no reversible error in the admission of these instruments in evidence in connection with the other evidence to show good faith and claim of title to the land in question. It is unnecessary to notice each of these assignments as they all involve practically the same question, though the description in

[Noble, et al. v. Saffold.]

some is more certain than in others. There was a great deal of evidence as to the different surveys and plattings of this land, and parol proof as to the actual possession.

The court, at the conclusion of the trial, gave the affirmative charge for the plaintiff. This was reversible error. There was ample evidence in this case to support a verdict and judgment for the defendant if the jury believed it; and the court should not have taken the question from the jury. The defendant's evidence tended to show that he and those under whom he claims had been in the actual, open, notorious, and continuous possession of the land, under claim of right and title, for more than 30 years prior to the bringing of the suit. It was clearly open for the jury to infer that this possession was adverse to that of the plaintiff and of all the world, and that it had continued for such length of time as to ripen into title; and that this possession was of such character and of such duration as to raise the presumption of a grant. It is true that there was some evidence tending to show that Noble's possession of the strip in question was not adverse, but that he was merely claiming to own up to the true boundary line which was unknown and uncertain; and that, while he was in the actual possession of the land in question, he was not claiming to own it if the true boundary line—when ascertained—showed that it was not a part of the tract claimed by him, and included within the description of his deeds. For this reason the general affirmative charge could not be given for the defendant.

If the jury believed this phase of the evidence, then Noble's possession was not adverse; and, if they believed the evidence of the plaintiff's surveyor, the lands in question were not included in Noble's deeds, and for

[Noble, et al. v. Saffold.]

this reason he could not recover, although he had been in the actual possession for more than 30 years. There was, however, as before stated, ample evidence, if believed by the jury, from which they might infer that the possession was adverse, was for more than 30 years, and contained all the other elements necessary to make it adverse. For example, the defendant Noble testified, among other things, as follows: "That he had been acquainted with the tract of land in dispute long years before he bought it, and that he bought it 29 years ago. That he remembered a survey made under the direction of Mr. Saffold by Mr. Washburn. That he had a letter from Mr. Saffold to call at his office. That he called at the office of Mr. Saffold, and that Mr. Saffold told him that his (witness') tenant was encroaching on Saffold, and that Saffold wanted to run the line between himself and witness. That witness told Saffold he was not aware of any encroachment and that he would speak to Mr. Ray, who was his tenant, about it. That witness was perfectly willing to establish a line. That witness did not make any statement that he did not know where the line was. That, if there was one thing in and about the place that he did know, it was where the lines were. That he knew where the line was—what he bought for the line. That he had nothing to do with any instructions as to surveying that. That he did not furnish any description of any land by which a line was to be run. That Mr. Saffold brought him out. That he came out at Saffold's request to run that line. That witness made no agreement with Mr. Saffold that any line which he might run or establish should be a line between witness and Saffold. That witness did not know that the surveyor intended to run the section line between the east and west half of the section until he got out there. That there was nothing said to witness by

[Noble, et al. v. Saffold.]

Mr. Saffold, or in the hearing of witness, in reference to running any line between the east and west half of that northwest quarter section. That witness had nothing to do with the survey other than to be present, at Mr. Saffold's request. That witness never said anything to Mr. Saffold about abiding by the survey which he had made. That he told Mr. Saffold that he objected to it. That witness did not furnish any data to the surveyor or either of the surveyors. That they did not ask for any. That they didn't ask for the deed of witness until after the survey. Mr. Washburn then asked witness if he had his Graves deed with him. That at the time he went into possession of the tract of land he fenced the entire tract, and that the line fence was on what is shown here to be line 'A.' That it began to rot down about the time that Wiggins left the place in 1891. That witness remembered when Saffold came up and bought the other place. That witness was in possession of the strip or tract of land here in dispute at that time. That witness was in possession of this strip here before Mr. Saffold came here. That he has been in possession of it ever since then. That he has been renting it. That it is in possession of witness at this time. That crops of cotton, corn chiefly, have been grown on it. That he had never had any conversation with Mr. Saffold in reference to or any understanding or make any agreement in reference to surrendering or giving up that tract of land." Witness Noble further testified that "he was put into possession of the tract of land by a tenant, Edison Williams, by walking around the hedge rows and showing him the lines; that Edison Williams was a tenant of Mr. W. H. Graves from whom witness bought the land." In answer to the question, "Did Mr. Graves give you any information?" witness stated, "Only by turning over Edison Williams' rent notes and

[State, ex rel. Bibb, et al. v. Town of Warrior, et al.]

telling Edison Williams to give me all the information I wanted about the place.”

This, in connection with other evidence of defendant's witnesses, was sufficient to carry the question of title by adverse possession to the jury, and the court erred in giving the affirmative charge for plaintiff.

Reversed and remanded.

DOWDELL, C. J., and ANDERSON and DE GRAFFENRIED, JJ., concur.

State, ex rel. Bibb, et al. v. Town of Warrior.

Mandamus.

(Decided April 17, 1913. 62 South. 69.)

1. *Mandamus; Compelling Performance of Duty.*—Mandamus does not lie to compel municipal officers having discretionary power to exercise their power in a particular way, but does lie to compel an imperative ministerial duty.

2. *Municipal Corporations; Officers; Statutes.*—Acts 1898-9, p. 724, sec. 4, is repealed by section 1067, Code 1907, which section makes it discretionary with the council whether it will create the office of marshal in towns having a population of less than 6,000.

3. *Same; Construction.*—Sec. 1048, Code 1907, means that a municipality may not continue an office, although authorized by its charter, where the office is not authorized by the Municipal Code Act, or by law; and does not mean that all officers merely authorized by the Municipal Code Act must, of necessity, be continued because required by the original charter of the town.

APPEAL from Birmingham City Court.

Heard before Hon. C. C. NESMITH.

Mandamus by the State on the relation of Carter R. Bibb, and others, against the town of Warrior, and the municipal council to compel said council to elect a marshal or other police officer for said municipality. Judgment denying relief and relators appeal. Affirmed.

[State, ex rel. Bibb, et al. v. Town of Warrior, et al.]

PHARES COLEMAN, for appellant. The charter of the town of Warrior makes it the duty of the town council to provide for appointment or election of a marshal, or other police officer.—Sec. 4, Acts 1898-9, p. 724. This provision is not repealed by the Municipal Code Act.—Secs. 1047, 1171, Code 1907; *Ogburn v. Ogburn*, 60 Ala. 616; *State v. Warring*, 24 Ala. 701; 28 Cyc. 244. The Municipal Code makes it the duty of the town council to provide for the appointment or election of a marshal or police officer.—Sec. 1192, Code 1907; *Tarver v. Tallapoosa County*, 17 Ala. 527; *Ex parte Bank*, 28 Ala. 28; *Ex parte Simonton*, 9 Port. 390; *Graham v. Tuscumbia*, 146 Ala. 449. The petition contains all the necessary allegations and mandamus is the proper remedy.—*Tarver v. Com. Ct.*, 17 Ala. 527; *Speed v. Cocke*, 57 Ala. 209; *Murphy v. State*, 59 Ala. 639; *Ex parte Edwards*, 123 Ala. 102; *Hill v. Tarver*, 130 Ala. 592; *Mosely v. Collins*, 133 Ala. 326; *Longshore v. Turner*, 137 Ala. 636; *Brice v. Burke*, 172 Ala. 219.

A. LEO OBERDORFER, for appellee. The Municipal Code revised the whole subject matter of municipal charters, and operated to repeal the former as it was evidently intended for a substitute for same.—*Lemay v. Walker*, 62 Ala. 39; *Edson v. State*, 134 Ala. 50; *Prowell v. State*, 142 Ala.; Sec. 1046, Code 1907; *Ward v. State, ex rel. Parker*, 45 South. 655; *City of Mobile v. F. & P. I. Co.*, 48 Ala. 342. Sections 1067-8, Code 1907, provide for only two officers, and leave it discretionary whether other officers therein named shall or shall not be provided, and mandamus will not lie to compel the exercise of that discretion.—*Ex parte Echols*, 39 Ala. 698.

ANDERSON, J.—The appellant sought by mandamus to compel the town council of Warrior, a municipi-

[State, ex rel. Bibb, et al. v. Town of Warrior, et al.]

pality of less than 6,000 inhabitants, to elect a marshal or other police officer for said municipality. As aptly stated in brief of appellant's counsel, "the only question in dispute in this case is whether the Legislature makes it the duty of the town council of the town of Warrior to provide for the appointment or election of a marshal or other police officer, or whether it is given the discretionary power to do so." If the council has the discretionary power, mandamus will not lie to compel action. If, on the other hand, the duty is an imperative ministerial one, mandamus is the proper remedy to compel action.

Acts 1898-99, p. 724, § 4, requires the election of a marshal by the town council; so the question that arises is whether or not this section has been repealed by the present municipal law, and whether or not the matter is now discretionary with the town council. Section 1067 of the Code of 1907 says: "In cities having a population of less than six thousand and in towns, the council shall elect a clerk, and may elect a recorder, and fix their salary and term of office, and may determine by ordinance the other officers of such city or town, their salary, the manner of their election, and the term of office, but there shall be no recorder in towns." It will be noted from the foregoing, that the town council have a discretion as to the creation or election of a marshal or other police officers. Therefore, as the act of 1898-99, makes the selection of a marshal imperative, and section 1067 of the Code makes it discretionary, there is a conflict between said section of the Code and section 4 of the act. The municipal act has a repealing clause of all laws, general and special, in conflict therewith. If, however, this repealing clause did not exist, or in case it relates to general and special laws only, and not to local laws, and whether the act of 1898-99 is a local or

[State, ex rel. Bibb, et al. v. Town of Warrior, et al.]

special law, as defined by the present Constitution, matters not, for the reason that section 1067 of the Code deals with all offices to be created or filled by the town council in towns of less than 6,000 inhabitants, and leaves it discretionary with them, except as to clerks, and as this law deals fully and completely with the subject, it operates as a repeal of section 4 of the act of 1898-99.—*Prowell v. State*, 142 Ala. 80, 39 South. 164; *Lemay v. Walker*, 62 Ala. 39; *Edson v. State*, 134 Ala. 50, 32 South. 308.

The following quotation from section 1048 of the Code of 1907: "Should there be any office existing under the charter of such city or town not authorized by this chapter, such office shall cease to exist at the first election hereunder"—is of no benefit to this appellant. It simply means that the municipality cannot continue an office, though authorized by its charter, if such office is not authorized by the municipal law, but does not mean that all offices which are authorized by the municipal act, and as to which the said act gives a discretion, must of necessity be continued because required by the original charter.

The trial court did not err in its rulings upon appellants' petition, and the judgment of the city court is affirmed.

Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

[State ex rel. Wilkinson, et al. v. Lane.]

State, *ex rel.* Wilkinson v. Lane.

Quo Warranto.

(Decided April 10, 1913. Rehearing denied May 8, 1913.
62 South. 31.)

1. *Constitutional Law; Legislative Power; Limitation.*—The legislature of a state possesses all the legislative power which resides in the state under the Federal Constitution, except as that power is expressly or impliedly limited by the State Constitution.

2. *Same; Departments of Government; Municipal Officers.*—Sections 42-3 of the Constitution do not apply to municipal government, or to town or city officers, and there is no constitutional objection to placing executive, administrative or legislative duties upon a municipal officer, and the mere fact that he is a judicial officer does not preclude him from serving the municipality as an executive.

3. *Same; Statutes; Legislative Motive.*—The motive of the legislature in enacting a statute is not a proper subject for judicial examination.

4. *Statutes; Construction.*—In construing a statute, the courts will give effect to the plain and validly expressed intention of the legislature.

5. *Same; Local Laws.*—The acts creating Commission form of government in cities having a certain form of government are not local acts.

6. *Municipal Corporations; Officers; Kind.*—Mere municipal officers are not state officers within the meaning of the Constitution.

7. *Same.*—Under Acts 1911, p. 204, the Board of Commissioners there created is a municipal board only, and the members thereof are mere municipal officers, and the fact that the Governor appoints the first incumbent, does not affect the character of the officers as municipal officers.

8. *Same; Judicial Officers.*—Acts 1911, p. 204, creating the Commission form of government and clothing one of the commissioners with powers of a judicial nature, does not render such Commissioner other than a municipal officer, and the fact that the Act fails to provide appeals from his decision, and that he may exercise legislative and executive functions as well, does not destroy the character of his office as a municipal, judicial one.

9. *Same.*—The provisions of section 150, Constitution 1901, do not prohibit the judicial officers named from holding judicial offices which have attached to them duties other than judicial, but only from holding offices not judicial; hence, it does not prohibit a circuit judge from holding during the term for which he was elected the office of commissioner of a city, under appointment, operating under Acts

[State ex rel. Wilkinson, et al. v. Lane.]

1911, p. 204, and exercising judicial functions of the city as its judicial officer.

10. *Same; Legislative Control.*—The legislature has full power to repeal, alter or amend the charter of a municipality, and to create a new municipality.

11. *Same; Commission Form; Statutes.*—The mere fact that the Governor of the State is to appoint the first three members of the Board of Commissioners of a city operating under the commission form of government provided in Acts 1911, p. 204, does not render the act unconstitutional.

12. *Same; Oath.*—The oath prescribed by Constitution, section 279, is required only from state, and not from municipal officers.

APPEAL from Birmingham City Court.

Heard before Hon. C. C. NESMITH.

Quo warranto by the State, on relation of Horace C. Wilkinson and others, against A. O. Lane, to oust defendant, as Commissioner of the City of Birmingham, from office on the ground that at the time of his appointment he was serving under an election as Judge of the Circuit Court of Jefferson County. From an order overruling demurrers to the answer and denying the writ, relators appeal. Affirmed.

HORACE C. WILKINSON, for appellant. The respondent's office is an office under the state within the meaning of section 150 of the Constitution.—*Ex parte Roundtree*, 51 Ala. 42; *Sproull v. Lawrence*, 33 Ala. 674; *State v. Thompson*, 142 Ala. 98; *City of B'ham v. So. Ex. Co.*, 164 Ala. 529; *Davis v. Thomas*, 154 Ala. 279. The Constitution makers intended that the judges named in said section should be barred from holding any office in said state except a judgeship during the term for which they were elected. The municipal office to which respondent was appointed was a state office.—*McQuillan Mun. Corp.* 102 and cases cited; 33 S. W. 813; 41 Mo. 29; 37 L. R. A. 211; 126 Pa. 954; 49 All. 36; 72 Am. Dec. 169; *Montgomery v. State*, 107 Ala. 372; *Andrews v. State*, 78 Ala. 483; 63 Am. St. Rep. 178; 15 N. Y. 532.

[State ex rel. Wilkinson, et al. v. Lane.]

If there is any doubt as to whether the office is an office under the state, the doubt must be resolved against defendant.—*State ex rel. Tillman v. Jackson*, 143 Ala. 145. The character of the office is to be determined not by the presence or absence of an official designation but by the nature of the functions to be performed.—*Joseph v. Randolph*, 71 Ala. 499; 7 Ohio St. 546. Under section 150 of the Constitution a judicial officer cannot hold office under any other government, and the defendant's office is certainly an office under any other government that the state or the United States.—Storey on Conflict of Laws, secs. 6 and 20; 23 Atl. 670; *Martin v. State*, 156 Ala. 89. The defendant's office is not a judicial office within the meaning of section 150—that is, the office of commissioner.—*Ex parte Roundtree*, *supra*; 5 Gratt. 518; 6 W. Va. 562; 21 S. W. 1081; 17 Ind. 169; 109 S. W. 758; *Joseph v. Randolph*, *supra*; 12 Ind. 569; 47 N. Y. Sup. 623. If the act permits the discharge of the duties of the office without the oath, it violates sec. 279 of the Constitution.—*Cavanaugh's Case*, 41 Ala. 399; *Gaines v. Harvin*, 19 Ala. 491. The commission form of government bill is a local law and void.—116 Fed. 295; 66 Ohio St. 453; 48 Ill. 590; *Sayres Case*, 142 Ala. 642; *Holt's Case*, 111 Ala. 372; *Savage v. Walsh*, 26 Ala. 619. The recall feature of the act renders it unconstitutional under section 175 of the Constitution.—*Nolen v. State*, 118 Ala. 154; 40 Am. St. Rep. 17; 44 Am. St. Rep. 788. The appointment by the Governor and legislature of a commission deprives the people of Birmingham of local self government, and renders the whole act unconstitutional.—24 Mich. 44; 4 L. R. A. 79; 4 L. R. A. 65; 4 L. R. A. 93; 34 L. R. A. 408; 41 L. R. A. 624; 56 L. R. A. 893; 81 S. W. 973; 81 S. W. 1206; 15 Am. Rep. 202.

[State ex rel. Wilkinson, et al. v. Lane.]

CABANISS & BOWIE, FRANK S. WHITE & SONS, ROMAINE BOYD, STERLING A. WOOD, and JAMES A. MITCHELL, for appellee. As amicus curi, Hon. A. G. & E. D. Smith, file a brief demonstrating that the act of the legislature creating an additional judge for the 10th Judicial Circuit was constitutionally valid, and submit authorities in support thereof, but in view of the opinion it is not deemed necessary to here set it out. On the original proposition involved counsel named above insist that the judgment of the lower court should be affirmed for the following reasons, and on the authorities cited. The terms "offices under this state," "state offices," and "offices" generally, as found in state constitutions, do not apply to or include municipal offices, and especially is this true where the incumbents do not exercise the functions of state officials.—*Draper v. State*, 57 South. 775; *Ex parte Wiley*, 54 Ala. 226; *Attorney General v. Connors* (Fla.) 9 South. 8; *State v. Burns*, 38 Fla. 367, 21 South. 290; *State v. Churchman* (Del.) 51 Alt. 47; *State v. Wilmington*, 3 Har. (Del. 300; *Murphy v. Townsend*, (Ark.) 79 S. W. 782; *Peterson v. Culpepper*, 72 Ark. 230, 79 S. W. 783; *Britton v. Steber*, 62 Mo. 370; *State v. Somnier*, 33 La. Ann. 238; *State v. Montgomery*, 25 La. Ann. 138; *Haynes v. Henry*, 62 Cal. 557; *People v. Provines*, 34 Cal. 520; *Long v. Rose*, (Ga.) 64 S. E. 84; *State v. Kirk*, 44 Ind. 401; *Mohon v. Jackson*, 52 Ind. 599; *Brickner v. Gordon*, 81 Ky. 665; *Justices v. Harcourt*, 43 Ky. 499; *Brody v. West*, 50 Miss. 68; *Santo v. State*, 2 Ia. 220; *Attorney General v. Detroit*, (Mich.) 70 N. W. 450; 37 L. R. A. 211. The duties of the commissioner of the city of Birmingham (or any city of the same class) for the term ending the 1st Monday in November, 1915, are purely municipal, and he has no functions pertaining to state affairs.—Acts of 1911, p. 204, sec. 5.

[State ex rel. Wilkinson, et al. v. Lane.]

There is a clear distinction in Alabama between municipal corporations proper, and *involuntary quasi-corporations*, such as counties, which are merely civil divisions of the state, created by statute to aid in the administration of government.—*Askew v. Hale County*, 54 Ala. 639; *Dunn v. Court of County Revenue of Wilcox*, 85 Ala. 144-146. The Constitution of Alabama expressly distinguishes between “offices under this state,” and offices under a municipality, or municipal offices.—Constitution of Alabama, secs. 68, 81, 101 and 281. The words “or any other government” in section 150 of the Constitution refer to a sovereign power, and do not extend the meaning of the section so as to include municipal offices.—Journal of the Constitution Convention, pp. 1385, 1397; *Wallace v. Board of Revenue*, 140 Ala. 572. The office of commissioner of the city of Birmingham, (or any other city of the one hundred thousand class) for the term ending on the first Monday in November, 1915, is a judicial office.—Act 1911, p. 204, sec. 5 and sec. 6; *Grider v. Talley*, 77 Ala. 422; *Rainey v. Ridgway*, 151 Ala. 534; *Higdon v. Jelks*, 138 Ala. 123; *Taylor v. Kolb*, 13 South. 780; *Winter v. Sayre*, 118 Ala. 22; *State, ex rel. Vandiver v. Burke*, 57 South. 872; *Twenty per cent. Cases*, 7 Ct. Cl. 293; *State v. Womack*, 4 Wash. 27; *Yellowstone Co. v. N. P. R. Co.*, 10 Mont. 420; *Matter of Cooper*, 22 N. Y. 882; *McGregor v. Balch*, 14 Vt. 428; *Vogel v. State*, 117 Ind. 374; *In re Gelding*, 57 N. H. 146; *Wise v. Withers*, 7 U. S. (3 Cranch) 331; *McVay v. Bipley*, 77 Conn. 136; *People v. Henry*, 62 Cal. 557. The act of March 31, 1911, providing for a commission form of government for cities of the class in which Birmingham belongs is not a local act.—*State, ex rel. Crenshaw v. Joseph*, 57 South. Rep. 942. The power conferred on the Governor by the said act to appoint each of the three commissioners at first, to

[State ex rel. Wilkinson, et al. v. Lane.]

serve for a prescribed term, is not an unconstitutional provision, and does not render the act void.—Dillon on Municipal Corporations (5th Ed.) sec. 98; *Sheppard v. Dowling*, 127 Ala. 1; *Fox v. McDonald*, 101 Ala. 51.

DE GRAFFENRIED, J.—“The British Parliament has supreme and uncontrolled power, and may change the Constitution of England, and repeal even Magna Charta, which is itself only an act of Parliament.” *In re Whitcomb*, 120 Mass. 118, 21 Am. Rep. 502.

The Legislature of Alabama has the same power that belongs to the British Parliament except in so far as its powers are abridged by the Constitution of the United States and the Constitution of the state. Speaking broadly, the government of the United States possesses no powers—except such as necessarily belong to it as an independent government—other than those which are conferred upon it by the federal Constitution. Speaking broadly, the Legislature of Alabama possesses all the legislative power which, under the federal Constitution, resides in the state, except where that power has expressly or *impliedly* been taken from it by the Constitution of the state. Speaking broadly, the Constitution of the United States is a *grant* of power. Speaking broadly, the Constitution of Alabama is a *limitation* upon the exercise of power.—*Miller v. Marx*, 55 Ala. 322.

1. “Municipal corporations are of a twofold character—the one *public* as regards the *state at large* in so far as they are *agents in government*; the other *private* in so far as they are to provide *local necessities* and conveniences for their own communities. And the fact that the Legislature has blended the *public* and *private* functions of a municipal corporation in *one* grant of power does not destroy the *clear* and *well-settled* distinction

[State ex rel. Wilkinson, et al. v. Lane.]

between them. In its governmental character the corporation is made by the state a *local depository* of certain limited and prescribed political powers, *to be exercised for the good of the state*. In its *proprietary* character the theory is that the powers are not conferred chiefly from considerations connected with the government of the *state at large*, but for the *private* advantage of the compact community which is incorporated as a distinct legal personality or corporate individual."—20 Am. & Eng. Ency. Law (2d Ed.) 1131; Abbott on Municipal Corporations, vol. 1, § 7.

At common law the citizens of towns and cities were subjects of the crown, but their officers were not crown officers. Cities and towns elected their officers, and those officers enforced for them the customs and by-laws of their towns and cities. The citizens of London set great store upon electing their mayor: "Come what might they would have no king but the mayor."—1 Stubbs, Const. History, 674.

"The charters which conveyed to the townsmen these precious privileges of freedom of trade, of justice, and of *internal* government had invariably to be *purchased* from the lord of the town, whether king, noble or abbot, and paid for in hard cash."—Taylor on the Origin and Growth of the English Constitution, 462.

While, in the sense that the government of England granted to a town, as a separate political entity, the privilege to exist, fixed its boundaries, and declared what, as a town, it was improper for it by ordinances to do, a town was a subordinate department of the English government, nevertheless, in that, either for a cash consideration or in some other way, the town people acquired the right to regulate, by their own town laws, their internal affairs and by officers selected by themselves, to collect the town's taxes and to administer

[State ex rel. Wilkinson, et al. v. Lane.]

justices under their valid town ordinances, an early distinction was drawn between a *town* officer and an officer of the crown, and between mere town affairs and the affairs of the crown or general government.

In truth, we do not see how, unless the historical development of municipal law is entirely discarded, it can be held upon sound reasoning that, in a state with a constitutional and statutory history like our own, a mere municipal officer can be held to be, within the meaning of our Constitution, an officer of the state. Town law found its origin in, and owed its development to, the principle of local self-government, the basic principle upon which all Teutonic governments rest. An Englishman might be proud to acknowledge himself the vassal of an English king, but when he claimed shelter under his own roof, he demanded that he should there be the "king in his own house." The dwellers in towns were perfectly willing to be the king's subjects, to obey his laws, and they were also willing that their towns should be the king's towns, but they demanded and received the right to govern the towns in which they lived, in accordance with their own regulations not in contravention of the general laws of the realm. The towns were the king's towns. Their inhabitants were the king's subjects, and they paid obedience to those who held office under the king; but the officers of a town were town officers, and the laws adopted by its people for their government as citizens of the town were town laws.

"No alien officer of any kind, save only the judges of the High Court, might cross the limits of their liberties; the sheriff of the shire, the bailiff of the hundred, the king's tax-gatherer or sergeant at arms, were alike shut out. The townsfolk themselves assessed their taxes, levied them in their own way, and paid them through

[State ex rel. Wilkinson, et al. v. Lane.]

their own officers. They claimed broad rights of justice, whether by ancient custom or royal grant; criminals were brought before the mayor's court, and the town prison with its irons and its cage, the gallows at the gate or on the town common, testified to an authority which ended only with death.

"In all concerns of trade they exercised the widest powers, and bargained and negotiated and made laws as nations do on a grander scale to-day. They could covenant and confederate, buy and sell, deal and traffic after their own will; they could draw up formal treaties with other boroughs, and could admit them to or shut them out from all the privileges of their commerce; they might pass laws of protection or try experiments in free trade."—1 McQuillin, Mun. Corps. 102, note 81.

In this country, the town idea found its best early field for development in New England. The people of that section soon began to turn their attention to commerce and trade, and these lines of human activity tend to the establishment of villages, towns, and cities. The towns were there with well-developed town laws in the early history of the colonies. The difference between the laws of the English government and these town laws was well marked and thoroughly understood. The difference between the selection of the town officers and the duties which they had to perform, and an officer of the government of England, or its representative, the colony, and the duties which such officer had to perform, were also well defined and understood. When the people of a town *met* in their town house to pass laws for the regulation of the affairs of the town only and to select officers for the town only, they knew that, while they were the subjects of England and while their town was an English town, they were acting only for the town, that the laws which they passed were mere towns laws,

[State ex rel. Wilkinson, et al. v. Lane.]

and that the officers selected by them held office *under them*, and that they were not officers of the government of England or of their colony. When, after the establishment of the federal government, in drafting their Constitutions, they referred in mere general terms to an officer of a state, they knew that they were not referring to mere *municipal officers*. In those days governments were simpler than they are to-day, for, to-day, a municipal officer frequently, by virtue of his office, owes one duty to his municipality and another to the state.

The same municipal (*town*) laws which were so well developed and so thoroughly understood in New England were the same municipal (*town*) laws which prevailed in Alabama when it was only a territory, when it adopted its various Constitutions as a state, and is the same municipal law which prevails to-day. It is that same municipal law which our ancestors brought with them from the parent country as a part of the English common law, and, in Alabama, a *mere* municipal officer is not, within the meaning of our Constitution, an officer of this state.—*Draper v. State*, 175 Ala. 547, 57 South. 772.

We have given the above subject full discussion, because, in the brief of counsel for appellant, the propriety of the decision of this court in *Draper v. State*, *supra*, is questioned,

2. Some man has said that *words* are *things*. At any rate, every word in a *statute* should *mean something*. When the meaning of words which are contained in a statute is plain and unambiguous, then courts, in construing such statute, should give to those words *that* meaning. Through the medium of words expression is given to the legislative will, and when that will is plainly and validly expressed, courts should give effect to that will.

[State ex rel. Wilkinson, et al. v. Lane.]

In the act entitled "An act to provide and create a commission form of municipal government and to establish same in all cities of Alabama which now have, or which may hereafter have, a population of as much as one hundred thousand people according to the last federal census," etc., approved March 31, 1911 (Gen. Acts 1911, p. 204), there is the following significant provision: "Said board of commissioners shall not have, possess or exercise any legislative, executive, judicial or administrative powers of the state or county, nor shall the offices held by them be state offices."

The quoted provision is plain and simple. All of the power of the state is embraced in its legislative, executive, judicial, and administrative departments, and the quoted provision cuts from the board of commissioners the exercise of any part of that power. The law has ever been that the municipal officers of a town or city shall not exercise any of the functions of the state government, unless, by statute, they are authorized to do so. Every power which is possessed by a municipality is a power which is delegated to it by the state, and every power which it possesses can, unless there is some constitutional limitation to the contrary, be taken from it by the state.

In the present instance the state had the power to declare that the board of commissioners should possess *only municipal* authority, and, having done so, they possess *only that* power and are municipal officers of the city of Birmingham merely. They possess "town" and not state authority.—*Dunn v. Court of County Revenues of Wilcox Co.*, 85 Ala. 141, 4 South. 661; *Mayor & Aldermen v. Allaire*, 14 Ala. 400; *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. Ed. 440.

The mere fact that the Legislature *created* the office in question and provided that the Governor should ap-

[State ex rel. Wilkinson, et al. v. Lane.]

point its first incumbent in no way affects the character of the office as a mere municipal office.

In the case of *Barnes v. District of Columbia*, *supra*, the court said: "A municipal corporation may act through its mayor, through its common council, or its legislative department by whatsoever name called, its superintendent of streets, commissioner of highways, or board of public works, provided the act is within the province committed to its charge. Nor can it, in principle, be of the slightest consequence by what means these several officers are placed in their positions—whether they are elected by the people of the municipality, or appointed by the President or Governor. The people are the recognized source of all authority, state and municipal, and to this authority it must come at last, whether immediately or by a circuitous process. An *elected* mayor or an *appointed* mayor derives his authority to act from the same source, to wit, that of the Legislature. * * * Its legislative charter indicates its extent, and regulates the distribution of its powers as well as the manner of selecting and compensating its agents. The judges of the Supreme Court of a state may be appointed by the Governor with the consent of the Senate, or they may be elected by the people; but the power and duties of the judges are not affected by the manner of their selection. The mayor of a city may be elected by the people, or he may be appointed by the Governor with the consent of the Senate; but the slightest reflection will show that the powers of this officer, *his position as the chief agent and representative* of the city, are the *same* under either mode of appointment.' In other words, if a charter is, by the Legislature, created for a city, and in that charter a certain office for that city is created, and by that charter *only municipal* duties are attached to that office,

[State ex rel. Wilkinson, et al. v. Lane.]

then it is *merely* a municipal office and its occupant *only* a municipal officer.

3. Section 42 of the Constitution declares that the powers of the government of the state of Alabama shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, viz., the legislative, the executive, and the judicial. Section 43 of the Constitution provides that in the government of the state, except in the instances expressly directed or permitted by the Constitution, the legislative department shall never exercise the executive and judicial powers or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; and that the judicial shall never exercise the legislative and executive powers, or either of them.

A casual reading of these sections will disclose that they have no applicability, and were never intended to apply, to mere town or city governments or to mere town or city officials. It is but familiar history that frequently a mayor of a town in the state was its only judicial officer, and in many of our towns, that condition exists to-day. The mayor was the chief executive officer of the town and at the same time he was the only judicial officer of the town. The mere fact that he was a judicial officer in no way precluded him from serving the town as an executive officer.—*State v. Ure*, 91 Neb. 31, 135 N. W. 224. This being true, there can be no constitutional objection to attaching executive, administrative, or legislative duties to one of the members of the board under discussion, who is a judicial officer, if one of the members is a judicial officer.

4. The act to which we have above referred, and which was approved March 31, 1911 (Acts 1911, p. 204), contains the following other provision: "The office of com-

[State ex rel. Wilkinson, et al. v. Lane.]

missioner the term of which under the provisions of this act expires on the first Monday in November, 1915, is, and shall be, a judicial office, and the commissioner appointed thereto, and hereafter elected thereto, is clothed with full and ample power to administer justice under the ordinances of said city only, and to administer judicially the ordinances of said city only, to the legislative and executive powers hereinabove conferred upon the commissioner whose term of office expires as aforesaid, shall be an incident merely to said judicial office and shall be confined only to municipal matters."

The charter of the city of Birmingham is fixed by the above-quoted act and to the Legislature of Alabama it owes its every grant of power. The Legislature has plenary power to alter, amend, withdraw, or repeal the charter of a city or town and to create an entirely new one. "It may, in its discretion, add to or diminish its corporate power and increase or remove limitations or restrictions on its exercise."—*City Council of Montgomery v. Shoemaker*, 51 Ala. 114; *State ex rel. Waring v. Mayor, etc., of Mobile*, 24 Ala. 701; *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. Ed. 440.

The fact that the Legislature has seen fit, in the act to which we have above referred, and which is, in reality, the charter under which the city of Birmingham now exists, to declare that a certain office created by the act shall be a judicial office and that its occupant shall exercise judicial functions, is a fact of which the city has, under the law, no right to complain. The city is but a creature of legislative authority and its creator had a right to declare what the powers of its various officers should be. While the Legislature has not, by a mere ipse dixit, the power to declare that a *nonjudicial* office is a judicial office, it has the right, however, to say *what officer of a town or city shall exercise the*

[State ex rel. Wilkinson, et al. v. Lane.]

judicial authority which, ex necessitate, resides in the town or city, and when it in fact confers that judicial authority upon a certain named officer, it may well declare that such an officer is a judicial officer. The city of Birmingham must look to the act in question and to the acts which it in effect amends, as the source of its every authority, except, of course, such implied authority as naturally and inherently belongs to all self-governing communities of the class to which that city belongs. This act, along with the other acts of the Legislature declaring what powers it shall and shall not possess, and through what officers it shall exercise those powers, is the *fundamental* law of the city and occupies to the city the same *relative* position that the *Constitution* of the state occupies to the people of the state. The act expressly calls into existence the office now under consideration and declares, simply and plainly, that the "commissioner appointed thereto, and hereafter elected thereto, is clothed with full and ample power to *administer justice under the ordinances of said city only*, and to administer *judicially* the *ordinances* of said city only."

If the Constitution of a state, ex proprio vigore, should create an office, and in the above terms, declare that the legal occupant of that office is clothed with full and ample power to administer justice under the laws of the state now in force or hereafter to be adopted and to administer judicially such laws, then that office would be, by virtue of the *Constitution itself*, a *judicial* office and its incumbent a judicial officer.

We can conceive of no town or city, even in the most primitive condition of society, which must not, ex necessitate, possess a need for town or city laws, and, as a necessary corollary, judicial officers to interpret and administer justice under those laws. In a modern city

[State ex rel. Wilkinson, et al. v. Lane.]

of 100,000 inhabitants there must be judicial authority somewhere, and the act under consideration, in unmistakable language, lodges that authority in the officer the title to whose office is challenged by this proceeding. There is nothing in the act which in any way trespasses upon the power of the city, by proper ordinances, not inconsistent with the powers conferred upon said officer as a judicial officer of said city, to select *other* officers to act, also, as municipal judges; but the fact that the city possesses *this* power in no way affects the question in hand. While the city may select other men to act as municipal judges, it *cannot* deprive the officer in question of that power. Only the Legislature, which *created* the office, can exercise *that* authority. In truth, we know of no terms in which the Legislature could have more sweepingly conferred the judicial authority residing in a municipality upon a city officer, than in the instance now under consideration. Whether the present incumbent of that office has or has not held a court, tried a case, or in any way exercised the judicial authority which the act confers upon him can have no bearing upon the subject. Neither does the fact that the city has failed—if it has failed—to regulate the manner in which he shall exercise the authority with which he is clothed in any way affect the character of the office. This officer, under the terms of the act which created his office, is clothed with judicial authority, and no act of the city, so long as he remains such officer, can deprive him of that authority or change the character of the office which he occupies. Under the terms of the act he has the right to act as a judge of said city without regard to ordinances prescribing his duties. Neither do we think that the mere fact that the act in question fails to provide a method of appealing from the decisions can affect the judicial character of the

[State ex rel. Wilkinson, et al. v. Lane.]

office. If he tries a case which is placed in the jurisdiction of a recorder, he is, while trying that case, a recorder, and his judgments possess the same force and effect as the judgment of any other recorder of the city while administering justice under the ordinances of said city only.

Section 150 of the Constitution of the state provides, among other things, that the Justices of the Supreme Court, chancellors, and the judges of the circuit and other courts of record, except probate courts, shall not hold any office, *except judicial offices*, of profit or trust under this state or the United States, or any other government, during the term for which they have been elected or appointed. While sections 42 and 43 of the Constitution to which we have already referred *divorce* the functions of the legislative, executive, and judicial departments of the *state* governments (except as otherwise provided in the Constitution) the one from the other, those sections, as we have already said, have no applicability to *mere town or city officers*, or to *mere city or town governments*. A judicial officer of a town or city may exercise *both* legislative and executive functions, and the fact that he does so in no way destroys the character of his office as a judicial office. The above subdivision 150 of the Constitution does not prohibit the named judicial officers from holding judicial offices, which have attached to them duties *other than* judicial duties, but only from holding offices *not* judicial.

It must be remembered that we are not dealing, in this opinion, with a *state* officer, but with a *municipal* officer *merely*. Undoubtedly the people of Alabama had the power in their Constitution to declare in what officers its judicial powers should reside and the courts over which they preside, the Legislature is powerless to abolish. "They constitute a co-ordinate and independ-

[State ex rel. Wilkinson, et al. v. Lane.]

ent department of the government, and there is no other department of the government that can abolish them.” —*State v. Sayre*, 118 Ala. 1, 24 South. 89; *Perkins v. Corbin*, 45 Ala. 118, 6 Am. Rep. 698.

The Legislature of Alabama in creating charters for municipalities have, except as expressly or impliedly restrained by the Constitution of the state, the same autocratic authority which is exercised by the people of the state when they go about adopting a state Constitution, and as the Legislature, in the exercise of lawful authority, has expressly declared that the incumbent of the office under consideration “is clothed with full and ample power to administer justice under the ordinances of said city only, and to administer judicially the ordinances of said city only,” no council or other governing body of the city of Birmingham can take from him that power. The charter of the city of Birmingham is, as to all municipal matters and all municipal officers of said city, as binding upon it as is the Constitution of Alabama upon the officers and the people of the state. This officer has the power, under the charter of the city of Birmingham, “to administer justice under the ordinances of the city.” The ordinances of the city are the *laws* of the city. Any person who is clothed with legal authority to *administer justice under the law* is a judicial officer.—*Settle v. Van Evrea*, 49 N. Y. 280; *Waldo v. Wallace*, 12 Ind. 509; *State v. Womack et al.*, 4 Wash. 19, 29 Pac. 939; *Reid v. Hood*, 2 Nott & McC. 168, 10 Am. Dec. 582.

The motive of the Legislature in declaring that the officer in question should possess the power “to administer justice under the ordinances of said city” is not a proper subject for judicial examination. “Neither can the court consider the policy or expediency of this en-

[State ex rel. Wilkinson, et al. v. Lane.]

actment."—*State v. Berghoff, May, etc.*, 158 Ind. 349, 63 N. E. 717.

As the office in question is a judicial office of a municipality, we can see no reason why a circuit judge, under the very language of said section 150 of the Constitution, is prohibited from holding it "during the term for which he was elected and appointed" even if the office is, within the meaning of said section 150, an office under this state.

5. Much argument is had in this case, by counsel on both sides, as to whether the office now under consideration is an office under this state within the meaning of said section 150 of our present Constitution. As it is our opinion that the office under consideration is a mere municipal office, and that it is a judicial office, it is not necessary for us to determine this question.

6. The act under consideration is not a local act.—*State v. Joseph*, 175 Ala. 579, 57 South. 943.

7. The mere fact that the Governor of the state was given the power to appoint the first three members of the board of commissioners does not render the act unconstitutional.—*State ex rel. Waring v. Mayor, etc., of Mobile*, 24 Ala. 701; 4 Mayf. Dig. p. 265, § 29, Dillon on Mun. Corp. (5th Ed.) § 98; *Fox v. McDonald*, 101 Ala. 51, 13 South. 416, 21 L. R. A. 529, 46 Am. St. Rep. 98; *Barnes v. District of Columbia*, *supra*.

8. The oath which is prescribed by section 279 of the Constitution applies only to *state*, and not to mere municipal, officers.

From what we have above said, it is evident that we are of the opinion that there is no error in the record.

Let the judgment of the court below be affirmed.

Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

[State, ex rel. Blish v. Thomas, et al.]

State, ex rel. Blish v. Thomas, et al.

Quo Warranto.

(Decided May 15, 1913. 62 South. 504.)

1. *Quo Warranto; Grounds; Public Office; Trial of Title to.*—The provisions of section 5453, Code 1907, do not authorize quo warranto to oust persons from office on the ground that the clerk and inspector officiating at the election at which such officers were declared elected, were incompetent to act as such clerk and inspector, whether or not their incompetency would invalidate the election if properly raised on a contest of the election.

2. *Elections; Contests; Grounds.*—Where the incompetency of a clerk and inspector of an election does not affect the result of an election, their incompetency is not ground for contest.

APPEAL from Mobile Circuit Court.

Heard before Hon. SAMUEL B. BROWNE.

Proceedings by the state on the relation of M. B. Blish against C. W. Thomas and others, in the nature of quo warranto to inquire into respondent's right to hold office. There was judgment sustaining demurrer to the petition, and relator appeals. Affirmed.

GORDON & EDDINGTON, for appellant. The petition is filed under section 5453, Code 1907, and authorizes the action here attempted. In the first place the demurrers should all have been overruled because addressed to the whole petition and not to the paragraphs alleging ground, since a demurrer bad as to a part of the pleading, is bad as to the whole.—*Bains v. Wells*, 107 Ala. 571; *Greil v. Lomax*, 86 Ala. 132. The third paragraph of the petition states a good and full cause of action.—*State v. Price*, 50 Ala. 571; secs. 455 and 1168, Code 1907. Quo warranto will lie.—*Parks' Case*, 100 Ala. 651; *Mizell's Case*, 173 Ala. 438. The grounds of in-

[State, ex rel. Blish v. Thomas, et al.]

competency of the clerk and inspector were properly stated, and authorized the action.—Sec. 1164, Code 1907; *Montgomery v. Henry*, 144 Ala. 629.

R. PERCY ROACH, for appellee. The court treated the whole petition as one and sustained the demurrer which was proper.—17 Enc. P. & P. 460; 40 N. J. L. p. 1. Information and quo warranto is a pleading and subject to the same objection as other pleading.—*L. & N. v. Gray*, 154 Ala. 156. It cannot unite in one suit separate and distinct causes.—*L. & N. v. Cofer*, 110 Ala. 492; *Johnson v. Selden*, 140 Ala. 421; 2 M. & S. 75; 17 Enc. P. & P. 440; 93 Am. Dec. 183. The election was not void in any event.—*Mizell v. State, ex rel.*, 173 Ala. 437. The election was subject to contest under the Code, and hence, quo warranto will not lie.—*Mizell v. State, ex rel., supra*; *Parks v. State*, 100 Ala. 634; *Montgomery v. Henry*, 144 Ala. 633. The grounds alleged would not be good grounds for a contest as the parties referred to were at least de facto a clerk and inspector, and would not have affected the election unless the result thereof was effected.—Authorities *supra*, and *Lee v. State*, 49 Ala. 56.

MAYFIELD, J.—This is a proceeding in the nature of quo warranto. It was instituted under section 5453 of the Code, to oust or remove appellees, on the ground that they were unlawfully holding and usurping the offices of mayor and aldermen of the town of Citronelle.

The only matter alleged in the petition as a fact to support the conclusion that appellees were usurpers of the offices which they were filling was that a clerk and an inspector, who officiated as such in the election at which appellees were declared to be so elected to such offices, were not qualified electors, and were therefore

[State, ex rel. Blish v. Thomas, et al.]

incompetent to act as clerk and inspector at such election.

A demurrer was interposed and sustained to this complaint, and from the judgment sustaining the demurrer the relator prosecutes this appeal. We are of the opinion that the trial court properly sustained the demurrer. The statute in question was not intended to authorize the revision or correction of such errors as the appointment of improper clerks and inspectors of elections.

It is not necessary to decide whether such clerk and inspector of the election could be ousted, because the petition does not seek to oust them, but seeks to oust those officers who were declared to be elected at the election in which such clerk and inspector officiated, on the ground of the incompetency of the clerk and inspector of the election, and not on the ground of the incompetency of the appellees declared to be elected.

It is likewise unnecessary to decide whether or not the incompetency of the clerk and the inspector would invalidate the election, which was otherwise valid, or whether the question could or would be properly raised on a contest of the election. If the question cannot be raised on a contest, it would not, for this reason, authorize a quo warranto proceeding such as is instituted in this case. On the other hand, the right of contest and that of quo warranto may both exist at the same time and on the same ground, such as the ineligibility, to hold the office, of the person declared to be elected; but we have never heard of quo warranto being instituted or prosecuted on the ground that some person officiating in the election was disqualified or incompetent to so act. That question cannot be inquired into, in a proceeding to oust the person declared to be elected. That is *res inter alios acta*. If the election at which appellees were

[State, ex rel. Blish v. Thomas, et al.]

elected was authorized by law, and was ordered by those authorized by law to order it, the mere fact that one of the clerks and one of the inspectors were ineligible or incompetent to act is not ground for quo warranto against any officer declared to be elected at such election.

There is nothing in this record to show that the incompetency of the clerk and the inspector affected the result of the election; and without this it would be no ground for contest.—*Henry's Case*, 144 Ala. 633, 39 South. 507, 1 L. R. A. (N. S.) 656, 6 Ann. Cas. A65; *Mizell's Case*, 173 Ala. 437, 55 South. 884; *Parks v. State*, 100 Ala. 634, 3 South. 756.

We do not think *Mizell's Case* is an authority to show error in the ruling of the trial court, but, on the other hand, we think it supports the ruling.

Finding no error, the judgment of the lower court will be affirmed.

Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

MEMORANDA

OF

CASES DECIDED DURING THE PERIOD EMBRACED IN THIS
VOLUME, WHICH ARE ORDERED NOT TO BE
REPORTED IN FULL.

CONTINENTAL INS. CO., ET AL. V. EURAKA
STOVE WORKS.

(Decided February 6, 1913.)

APPEAL from Birmingham City Court.

Heard before Hon. H. A. SHARPE.

JOHN T. GLOVER, for appellant. STERLING A. and
CLEMENT R. WOOD, for appellee.

Per curiam. Dismissed by agreement.

EX PARTE LETCHER.

(Decided February 8, 1913.)

Original petition in the Supreme Court.

O. S. LEWIS, for petitioner. MERRITT & RILEY, and
WALTON H. HILL, for respondent.

Per curiam. Mandamus denied.

EX PARTE STRANGE.

(Decided February 6, 1913.)

Certiorari to Court of Appeals.

KYLE & HUTSON, and WERT & LYNNE, for petitioner.
R. C. BRICKELL, Attorney General and W. L. MARTIN,
Assistant Attorney General, for respondent.

MCCLELLAN, J.—Petition denied on authority of *Ex parte Woodward*, *infra*, 97; 61 South 295.

All the justices concur.

E. W. GATES LUMBER CO. V. GIVINS.

(Decided February 13, 1913.)

APPEAL from Washington Circuit Court.

Heard before Hon. SAMUEL B. BROWNE.

GRANADE & GRANADE, for appellant. TURNER, WILSON & TUCKER, for appellee.

DOWDELL, C. J.—Assignments of error are pasted in transcript, and on the authority of *Hunter v. L. & N. R. R. Co.*, 150 Ala. 594, 43 South. 802, the judgment is affirmed.

ANDERSON, MAYFIELD and DE GRAFFENRIED, JJ., concur.

HOWARD V. THE STATE.

(Decided April 17, 1913.)

APPEAL from Mobile City Court.

Heard before Hon. O. J. SEMMES.

No counsel marked for appellant. R. C. BRICKELL, Attorney General, and W. L. MARTIN, Assistant Attorney General, for the State.

DE GRAFFENRIED, J.—The time for presenting bill of exceptions having expired before the case was submitted, and there being no error of record, the cause is affirmed.

All the Justices concur.

JONES V. THE STATE.

(Decided February 13, 1913.)

APPEAL from Jefferson Criminal Court.

Heard before Hon. S. E. GREENE.

A. L. ARNOLD, for appellant. R. C. BRICKELL, Attorney General, and W. L. MARTIN, Assistant Attorney General, and BORDEN H. BURR, Solicitor, for the State.

MAYFIELD, J.—No bill of exceptions and no error of record. Affirmed.

All the Justices concur.

SLOSS-SHEFFIELD STEEL & IRON CO. V.
MITCHELL.

(Decided April 24, 1913.)

APPEAL from Jefferson Circuit Court.

Heard before Hon. E. C. CROWE.

TILLMAN, BRADLEY & MORROW, and CHARLES E. RICE, for appellant. SAM WILL JOHN, and T. T. JONES, for appellee.

DE GRAFFENRIED, J.—Reversed and remanded on authority of *Sloss-S. S. & I. Co. v. Mitchell, infra*; 61 South. 934; same case 161 Ala. 278; 49 South. 851.

All the Justices concur.

STACEY V. JONES.

(Decided April 8, 1913.)

APPEAL from Monroe Law and Equity Court.

Heard before Hon. W. G. MCCORVEY.

INGE & MCCORVEY, for appellant. W. B. MERRILL, and STEVENS, LYONS & DEAN, for appellee.

Per curiam. Affirmed by agreement.

STONE V. THE STATE.

(Decided February 6, 1913.)

APPEAL from Madison Law and Equity Court.

Heard before Hon. JAMES H. BALLENTINE.

No counsel marked for appellant. R. C. BRICKELL, Attorney General, and W. L. MARTIN, Assistant Attorney General, for the State.

Per curiam. Dismissed on motion of the Attorney General.

THOMAS V. THE STATE.

(Decided February 13, 1913.)

APPEAL from Hale Law and Equity Court.

Heard before Hon. CHARLES E. WALLER.

No counsel marked for appellant. R. C. BRICKELL, Attorney General, and W. L. MARTIN, Assistant Attorney General, for the State.

Per curiam. Abated by death of appellant.

THOMPSON V. ALABAMA STATE LAND CO.

(Decided February 13, 1913.)

APPEAL from Blount Circuit Court.

Heard before Hon. J. E. BLACKWOOD.

No counsel marked for either party.

Per curiam. Affirmed on certificate.

WEATHERLOW V. THE STATE.

(Decided February 13, 1913.)

APPEAL from Colbert Circuit Court.

Heard before Hon. C. P. ALMON.

No counsel marked for appellant. R. C. BRICKELL, Attorney General, and W. L. MARTIN, Assistant Attorney General, for the State.

Per curiam. Appellant is a fugitive from justice, and his appeal is dismissed.

SUBJECT INDEX

ABATEMENT AND REVIVAL.

Abatement and Revival; Another Action Pending; Dismissal.—

The fact that an action had been dismissed is a complete answer to a plea in abatement on the ground of the pendency of such other action.—*McLaughlin v. Beyer*, 427.

Same; Evidence.—A plea in abatement of the pendency of another action, is not good unless the parties are the same, and where the parties are different the duty is on the pleader to show the identity of the parties.—*Id.* 427.

ABSTRACTORS.

Abstractors; Purchase of Adverse Interest.—An abstractor is not the agent of a purchaser in such sense as to preclude him from purchasing from the true owner a right in premises for which he had furnished the purchaser an abstract of title correctly showing the outstanding right which the abstractor subsequently purchased.—*Moore v. Empire Land Co.*, 344.

ADVERSE POSSESSION.

Adverse Possession; Conveyance by Life Tenant; Effect.—Where a grantee in a deed purporting to convey the fee, but executed by a tenant in common for life, went into the possession, and held the same for ten years, notoriously and exclusively without recognition of the title of any other person, and those claiming under him continued such possession for more than twenty years, the grantee and those claiming under him held such possession as ripened into a title after ten years, as against strangers.—*Kidd, et al. v. Borum*, 144.

Same; Acts of Ownership; Notice.—Customary acts of ownership by one in possession under a deed purporting to convey the fee was sufficient to impute notice to all not claiming in privity with the possessor.—*Id.* 144.

Adverse Possession; Evidence.—Evidence of mere occasional trespass upon wild, unoccupied land for the purpose of removing timber is not sufficient to show adverse possession.—*Williams v. Lyon*, 531.

Same; Notoriety of Possession.—While the notoriety of possession may be shown by hearsay testimony, adverse possession itself cannot be shown.—*Id.* 531.

Adverse Possession; Color of Title.—Color of title is a writing which in appearance purports to, but in reality does not, transmit title or the right of possession.—*Bowles v. Lowery*, 603.

Same; Extent of Possession.—In the absence of color of title, title by adverse possession can be acquired only to the land actually occupied by the adverse claimant, or those through whom he claims.—*Id.* 603.

Same; Evidence; Definiteness.—In the absence of bona fide claim under color of title, inheritance or purchase, the evidence which will authorize a recovery must furnish data from which actual possession of a definite, particular area may be ascertained; it cannot be left to speculation or conjecture.—*Id.* 603.

ADVERSE POSSESSION—Continued.

Same.—Indicia of actual possession of a part or parts of a forty-acre tract, or of three acres thereof about a spring is insufficient, in the absence of evidence of possession of any particular part, or of the particular form of the three acres.—*Ib.* 603.

Same; Notice; Statute.—Since the passage of section 1541, Code 1896, one cannot acquire title by adverse possession without having filed the required notice, unless his entry was under color of title, bona fide claim of inheritance, or of purchase.—*Ib.* 603.

Same; Instructions.—That there may be an adverse possession there must in addition to the other elements be an exclusive possession; hence, an instruction asserting that if a plaintiff acquired actual possession of the land at a certain time and kept continuous possession, doing certain things for twenty-five years, this adverse possession will ripen into title, in failing to hypothesize that the act of possession was exclusive, was affirmatively erroneous.—*Ib.* 603.

Adverse Possession; Notice; Statutes.—Where a defendant claims the land both under color of title and as a bona fide purchaser, the statute of registration of adverse claim is without application.—*Howard v. Martin*, 613.

Adverse Possession; Vendor and Purchaser; Payment.—The occupancy of a person in possession of the property who has fully paid the purchase money is a possession adverse to the vendor.—*Cannon v. Prude*, 629.

Same; Jury Question.—The evidence examined and held sufficient to take to the jury the question of adverse possession of defendant and his predecessors in title.—*Ib.* 629.

Same; Tacking; Administrator.—When an administrator has the legal right by a statute to take possession and control of his decedent's real estate, and actually does so, the possession of the administrator may be tacked on to the possession of his intestate for the purpose of completing the bar of the statute of limitations.—*Ib.* 629.

Same; Trustee in Bankruptcy.—A bankrupt is civiliter mortuus and the trustee of his estate is his administrator, and hence, the possession of the trustee may be tacked on the possession of the bankrupt to complete the bar of the statutes of limitations.—*Ib.* 629.

Adverse Possession; Evidence.—Deeds under which the evidence showed that actual possession of the land was taken by the grantee are admissible to show good faith in taking and holding possession, even though the description is too uncertain to operate as conveyance of title or to constitute color of title.—*Noble v. Saffold*, 636.

Same; Jury Question.—The evidence examined and held to require a submission to the jury to determine whether defendant's possession was adverse or merely under a claim of ownership to the true boundary line which was uncertain.—*Ib.* 636.

ACKNOWLEDGMENTS.

See Deeds.

Acknowledgment; Wife; Separate Examination.—A wife's separate examination and acknowledgment is necessary only where the title to the homestead is in the husband.—*Spink v. Guarantee B. & T. Co.*, 272.

Acknowledgment; Defective; Direct Attack.—An attack on a timber deed for alleged disqualification of the officer to take the acknowledgment of the parties is direct, and not collateral.—*Vizard v. Robinson*, 349.

Same; Deed; Effect.—An efficacious acknowledgment of the deed not only renders it self-proving when seasonably recorded, but im-

ACKNOWLEDGMENTS—*Continued.*

ports a verity against which none can complain except for duress or fraud.—*Ib.* 349.

Same; Officers; Disqualification; Interest.—Where an attorney who was also a notary public was employed to purchase standing timber interest, and was paid a specific price per acre for his services, he could not be said to have an interest in the conveyance of the timber so purchased, but an interest only in the transaction, and hence, was not disqualified to take the acknowledgment of the grantors in the deed.—*Ib.* 349.

Acknowledgment; Form.—Only a substantial compliance with the form of acknowledgment by the statute is required.—*Bowles v. Lowery*, 603.

Same; Instructions.—The acknowledgment and the deed are to be read together in construing the acknowledgment.—*Ib.* 603.

Same.—Where the certificate of acknowledgment read that "B., her heirs, whose name is signed to the foregoing conveyance and who is known to me, etc.," when taken in connection with the evidence that the other signers were all of the children of B., except the grantee, it is to be read with "and" between the word "B." and the words "her heirs," and with the word "are" in the place of the word "is" where it occurs, and hence, must be construed as a certificate of acknowledgment by all the grantors.—*Ib.* 603.

Same; Clerical and Grammatical Errors.—If what was intended to be expressed can be clearly seen, without resort to mere inference or conjecture, errors of a purely clerical or grammatical nature will not avoid a certificate of acknowledgment.—*Ib.* 603.

ACCOUNTING.

Account; Equitable Action for; Mutuality.—Where there are mutual accounts between parties, either may resort to equity for a statement of the account, and to ascertain and recover any balance due regardless of whether there is a confusion or complication in the account, and whether or not complainant claims a balance due him.—*Phalin v. Dearman*, 320.

ACTS CITED OR CONSTRUED.

General.

- 1909 p. 8. *Allen v. State, ex rel. Rowe*, 383.
- 1909 p. 8. *Ex parte Woodward*, 97.
- 1909 p. 63. *Ex parte Woodward*, 97.
- 1909 p. 63. *Allen v. State, ex rel. Rowe*, 383.
- 1909 p. 212. *Adams v. State*, 58.
- 1909 p. 305. *Jones v. State*, 9.
- 1911 p. 30. *Allen v. State, ex rel. Rowe*, 383.
- 1911 p. 59. *Montgomery B. & T. Co. v. Walker*, 368.
- 1911 p. 204. *State, ex rel. Wilkinson v. Lane*, 646.
- 1911 p. 250. *Allen v. State, ex rel. Rowe*, 383.

Local.

- 1898-9 p. 724. *State ex rel. Bibb v. Warrior*, 642.

ACTIONS.

See Pleadings.

1. Separate Cause.

Action; Separate Cause; Damage for Overflow.—Where the channel of a stream is permanently obstructed by a dam or fill so as to cause a constant overflow upon another's land, the damages are regarded as original, and must be recovered in one action; but where

ACTIONS—Continued.

a culvert is provided, sufficient to carry off water in usual volume, thus causing only occasional recurrent overflows, the damage is continual, and each overflow constitutes a separate and distinct cause of action.—*Sloss-S. S. & I. Co. v. Mitchell*, 576.

APPEAL AND ERROR.**1. Showing Error.**

Appeal and Error; Showing Error; Burden; Presumption.—It is incumbent upon appellant to affirmatively show error, and this rule applies to a predicate for the admission of evidence, as well as to other questions, the presumption being that the trial court did its duty, and required a proper predicate to be laid, if one was necessary.—*Ex parte State*, 4.

1½. Briefs on.

Appeal and Error; Supplemental Brief; Points Not Previously Urged.—The supplemental brief that is permitted by the rule must support assignments urged in the brief required to be filed as a prerequisite to the submission of the cause; hence, a supplemental brief filed after the submission of the cause for decision which attempts to make points that have not been referred to in the original brief comes too late.—*Jebeles-C. Conf. Co. v. Booze*, 456.

2. Harmless Error.**(a) Evidence.**

Appeal and Error; Harmless Error; Evidence.—Where a matter was admitted, a defendant was not prejudiced by being required to answer questions on cross-examinations concerning such matter.—*Glimer v. The State*, 23.

Appeal and Error; Harmless Error; Evidence.—Where the court afterwards excluded irrelevant testimony, its former omission was rendered harmless.—*Sanders v. The State*, 35.

Appeal and Error; Harmless Error; Evidence.—The exclusion of questions seeking a mere repetition of facts already stated by the witness is neither erroneous nor prejudicial.—*Jones v. The State*, 63.

Appeal and Error; Harmless Error; Evidence.—The admission of hearsay testimony favorable to the appellant is harmless error.—*Webb v. Gray*, 408.

Appeal and Error; Harmless Error; Evidence.—Where there was no evidence of the intention of defendant to hold adversely the land from which he was charged to have cut timber, the exclusion of evidence showing color of title in defendant was harmless, if erroneous.—*Williams v. Lyon*, 531.

Appeal and Error; Harmless Error; Evidence.—Where the testimony that the property was damaged was followed by a statement of the witness of the actual condition, his statement that the property was damaged was harmless.—*Sloss-S. S. & I. Co. v. Mitchell*, 576.

(h) Pleading.

Same; Harmless Error; Pleading.—Where a replication to a plea of privilege alleged that defendant's comment was not reasonable or fair, and was not confined to fair comment on the alleged fact, and also set up additional facts, it was no more than a denial of one of the necessary averments of the plea, and plaintiff was not injured by the elimination of the replication, as a special reply.—*Parsons v. Age-Herald Pub. Co.*, 439.

APPEAL AND ERROR—Continued.

Appeal and Error; Harmless Error; Pleading.—Any error in sustaining a demurrer to a plea is harmless where a substantially similar plea makes up some of the issues, especially where not supported by the evidence, and it not appearing how the ruling could have deterred the defendant from making any proof he had of the other plea.—*Empire Imp. Co. v. Lynch*, 473.

Appeal and Error; Harmless Error; Pleading.—Where all of the defenses which were provable under the pleas to which demurrers were sustained were also provable under a plea to which no demurrers were sustained, the action in sustaining demurrers to the plea was rendered harmless.—*Twin T. L. Co. v. Day*, 565.

3. Objections and Time.

Appeal and Error; Objections; Time; Waiver.—Where a decree was entered vacating a conveyance as being in fraud of a judgment held by the complainant, an objection that complainant did not prove the assignment of the judgment to him cannot be taken by the debtor where it appears of record that objections were not filed until the conclusion of the chancery term, and after the submission of the cause, and where the note of submission does not show a submission on such objection, and they were not noticed in the decree.—*Hamner v. Freeman*, 109.

4. Disposition of Cause.

Appeal and Error; Disposition of Case; Judgment.—Where the court denied relief because of the uncertainty as to his power to order a sale, and not because of a failure to prove the allegations of the bill, the appellate court, upon determining that the court had power to order the sale, will enter a decree ordering a sale of the land.—*Clements v. Faulk & Co.*, 219.

Appeal and Error; Remandment.—Where a bill was subject to a general demurrer, the appellate court will render a decree sustaining demurrer, and will remand the cause for further action in the lower court.—*Farrow v. Sturdivant Bank*, 283.

5. Assignments of.

Appeal and Error; Assignments.—If any of the exceptions to the report of the register were properly overruled an assignment of error as to the overruling of objections and exceptions to a referee's report on reference, and confirming such report is not sustained.—*Heard & Lee v. Heard*, 230.

6. Review.**(a) Findings of Court or Jury.**

Appeal and Error; Findings; Conclusiveness.—The findings of a register on reference have the force and effect of a verdict of a jury, and will not be disturbed by the chancellor or appellate court unless plainly and palpably erroneous.—*Metcalf v. First State Bank*, 323.

Same; Review; Verdict Against Evidence.—Where, after making all proper allowances, it is clear that the findings and judgments of the trial court are wrong, this court will reverse notwithstanding it pays great respect to the judgment of the trial court as to the weight and credibility of the oral testimony in support of the verdict and judgment.—*Twin Tree L. Co. v. Day*, 565.

Appeal and Error; Review; Directed Verdict.—In considering whether plaintiff was entitled to the affirmative charge the appellate court will consider only the phases of the evidence and its tendencies which are favorable to defendant, and in doing so, the court will

APPEAL AND ERROR—Continued.

treat as having been admitted certain evidence which was excluded but which should have been admitted.—*Cannon v. Prude*, 629.

(b) Presumptions.

Appeal and Error; Review; Presumptions; Amendments to Pleading.—Under section 5367, Code 1907, an order requiring plaintiff to pay the cost as a condition to the allowance of his amendment not negativing the fact that the amendment would cause an injustice to defendant, it will be presumed that conditions existed which justified the trial court in imposing such cost, and his action thereon will not be reviewed on appeal.—*Hanchey v. Brunson*, 453.

Appeal and Error; Presumptions.—Where an exception was taken to a part of the oral charge, and the court undertook to correct the charge, it cannot be assumed that the jury failed to properly heed the corrections thus made.—*B. R. L. & P. Co. v. Mayo*, 525.

7. Effect on Judgment in Trial Court.

Appeal and Error; Effect of Appeal on Judgment of Lower Court.—Where a party has perfected an appeal and has superseded the execution of a judgment in the trial court, the trial court loses all jurisdiction and control over said judgment and cannot after that time either correct the judgment or set it aside.—*McLaughlin v. Beyer*, 427.

8. Record.**(a) Questions Presented.**

Same; Record; Questions Presented.—This court will not review on appeal the summons and complaint issued in a previous suit where it is not made to appear how such summons and complaint could be used to contradict the testimony of the plaintiff as a witness, for which purpose alone it was offered.—*McLaughlin v. Beyer*, 427.

Appeal and Error; Record; Matters Shown.—Where the record fails to show the grounds on which a plea was demurred to, it will be presumed on appeal that the demurrers did not reach the defects in the pleas, where they were overruled by the trial court.—*Parsons v. Age-Herald Pub. Co.*, 439.

9. Setting Aside Verdict.

Appeal and Error; Amount of Recovery; Setting Aside on.—Where the discretion of the jury is abused by awarding excessive damages, or by awarding no damages when plaintiff is entitled thereto, such a verdict may be set aside.—*B. R. L. & P. Co. v. Coleman*, 478.

10. Waiver of Defects.

Same; Dismissal of; Waiver.—Where a cause was submitted to the Court of Appeals on its merits without objection to a consideration of the appeal, such objection is waived, and upon the case being transferred to this court in that condition, it will decline to consider the motion to dismiss.—*Twin Tree L. Co. v. Day*, 565.

ARREST.

See Homicide.

1. Right to Make.

Arrest; Right to Make.—Decedent had no right to arrest, or to attempt to arrest defendant, where he was not deputized for that purpose, and had no process for the arrest, and acted merely on information that a felony had been committed in an adjoining

ARREST—Continued.

county; that defendant was a fugitive; that an unknown woman was thought to be the wife of defendant, and that such woman was his wife.—*Sanders v. The State*, 35.

ASSAULT AND BATTERY.

See Master and Servant, § 1.

1. Civil.

Assault and Battery; Evidence.—Where plaintiff's witness testified that he was standing on a railroad track some distance away, and saw the shot fired that hit plaintiff, the testimony of a witness for defendant who stated that he stood about thirty feet from where the shot was fired, as to whether he could see a man on a railroad track from where he was standing, was properly excluded.—*Republic I. & S. Co. v. Passafume*, 463.

Assault and Battery; Intent; Civil Liability.—An intent to injure is not an essential to civil liability for an assault.—*B. R. L. & P. Co. v. Coleman*, 478.

BANKS AND BANKING.**1. State Regulations.**

Banks and Banking; Insolvency; Rights of Bank Superintendent.—Under the provision of sec. 10, Acts 1911, p. 59, the superintendent is in reality a receiver, and there is no change in the ownership or legal title of the property.—*Montgomery B. & T. Co. v. Walker*, 368.

Same; Power of Superintendent.—Under the provisions of section 10, Acts 1911, p. 59, the superintendent has power to sue in the name of the bank to avoid a fraudulent transaction made by the bank officials.—*Ib.* 368.

Same; Trust Fund.—Regardless of the provision of section 3509, Code 1907, the assets of an insolvent bank must be regarded as a trust fund for the payment of creditors, and the stockholders, directors and agents of the bank are trustees for their benefit, and as such may be made to discover and account in chancery.—*Ib.* 368.

Same; Action by Superintendent; Remedy at Law.—Where the superintendent of banks desires to avoid a transaction whereby the officers of an insolvent institution pledged collateral to another bank for an antecedent debt, as well as one presently created, and challenged the authority of the officers, but offered to do equity, he had no plain and adequate remedy at law, and the jurisdiction of equity was properly invoked.—*Ib.* 368.

Same.—Where the superintendent of banks filed a bill to set aside a pledge of the assets of an insolvent bank made by its president, and averred that the president had no such authority, it was not necessary that the bill should negative special authority, as that was a matter of affirmative defense.—*Ib.* 368.

Same; Power of President.—The rule that presidents of corporations have no ex-officio power to sell or mortgage the property of the corporation, applies to bank presidents, and such officials have no right to pledge the assets of the bank, particularly to secure an antecedent and questionable debt.—*Ib.* 368.

Same; Power of Cashier.—While the cashier of a bank is its chief executive officer, and his authority exceeds that of the president and while he may sell the banks negotiable security in the regular course of business, his power is not unlimited, and he cannot pledge the assets of the bank for the payment of an antecedent debt.—*Ib.* 368.

CARRIERS.

1. Of Passengers.

(a) Assaults on.

Carriers; Passengers; Assault by Employee.—A street railway company is civilly liable to a passenger for an assault where its conductor assaulted such passenger by presenting a pistol at him at close range, unless the conductor was free from fault in bringing on the difficulty resulting in the use of the pistol, and unless it reasonably appeared to him that it was necessary for him to present the pistol to protect his own person from a battery at the hands of a passenger; hence, the court was not in error in instructing the jury that the assault could not be justified so as to relieve the company from liability unless the conductor was free from fault in bringing on the difficulty, and unless it appeared to him reasonably, and not merely fancifully, that it was reasonably necessary to assault the passenger to protect himself or the person of another passenger, and unless the means employed were in kind and degree no more than was reasonably necessary for such protection.—*B. R. L. & P. Co. v. Coleman*, 478.

Same; Justification; Evidence.—It was proper to charge that the burden of proving its plea of justification was on the street railway company, where the suit was by a passenger against such company for damages for an assault committed by its conductor.—*Ib.* 478.

Same.—Abusive or insulting language by a street car conductor towards a passenger is not to be justified; the passenger being entitled to at least nominal damages, and evidence that such language was brought about by the misconduct of the passenger being admissible in mitigation of damages only.—*Ib.* 478.

Same.—The court's instruction that if there was an unlawful assault without justification "in that sort of a case," the jury should impose punitive damages as punishment for the wrongful act, and that this was left to the jury in the exercise of its sound judgment and discretion, was not erroneous when read in connection with the whole charge; it appearing that in using the quoted words the court meant that where there was an unlawful and unjustifiable assault accompanied by wrongful, abusive and insulting language, the jury could award exemplary damages in their discretion.—*Ib.* 478.

Same.—Where a street car conductor unlawfully and without justification assaults a passenger, at the same time humiliating him by abusive and insulting language, the jury, in its discretion, may award exemplary damages since exemplary damages are recoverable for assaults or assaults and batteries where the wrongful act is done wantonly or maliciously, or is attended by insult, oppression, or other circumstances of aggravation.—*Ib.* 478.

(b) Complaints for Injury.

Carriers; Passengers; Complaint; Negligence.—Where the complaint charged that plaintiff took passage on one of defendant's cars and paid her fare thereon, and that when she reached her destination the car stopped, but just before she arose from her seat it moved forward with a jerk, and she was thrown violently against a seat and injured, and that the injury proximately resulted from the negligent way in which defendant conducted itself in and about carrying her to her destination; and a count alleging the same state of facts with the allegation that the injuries were due to the negligent

CARRIERS—Continued.

way in which defendant handled a car on which plaintiff's wife was riding, neither count was demurrable on the ground that the general averment of negligence was overcome by the particular facts stated.—*B. R. L. & P. Co. v. Wilcox*, 512.

Negligence; Complaint; General and Specific Averments.—A complaint for injuries which charges negligence generally is sufficient, unless it contains language limiting the general averments to acts or omissions described in the count which do not justify the general conclusion of negligence.—*Ib.* 512.

Carriers; Passengers; Injuries; Name of Servant or Agent.—The matter of the name of the servant in charge of a car is best known to the defendant corporation, and the passenger is not presumed to have knowledge on this point; hence, the complaint in an action for damages to a passenger which alleges that the injury was wantonly or willfully inflicted by the agents or servants of defendant, who were in charge of the car, and while acting within the scope of their authority was not insufficient because it failed to give the names of the agents or servants or to state definitely whether it was the mortorman or conductor who caused the injury.—*B. R. L. & P. Co. v. Goldstein*, 517.

Damages; Passengers; Pleading.—An allegation in the complaint that plaintiff "was crippled and disfigured, and a bump was caused to be upon his head" is sufficient to sustain a verdict for damages as for permanent injury, as it is not necessary that it be alleged in terms that the injuries were permanent.—*Ib.* 517.

(c) Alighting Passengers.

Carriers; Passengers; Negligence; Jerking Car.—Where a passenger was alleged to have been injured by a jerking of the car, whether or not evidence of such jerk will sustain a charge of negligence, depends on the violence of the jerk, the situation of the passenger at the time, and the duty of the carrier to know that situation.—*B. R. L. & P. Co. v. Mayo*, 525.

Same; Affording Opportunity to Alight.—Where a car has stopped at a regular stopping place for letting off passengers, it was the carrier's duty, through its agents operating the car, to inform itself whether a passenger was in the act of leaving the car, and in a position that would be rendered perilous by putting the car in motion, and a failure to discharge that duty on the part of the servants or agents of defendant would be negligence rendering defendant liable.—*Ib.* 525.

CERTIORARI.

See courts, § 1.

Certiorari; Nature of Writ; Right to.—Certiorari is not a writ of right, and unless it is made so by the statute, it will not be granted except where substantial justice requires it.—*Ex parte Livingston*, 94.

CHAMPERTY AND MAINTENANCE.

Champerty and Maintenance; Enforcement by Grantee.—The express or implied covenants of a deed of land adversely held when conveyed are available to the grantee, notwithstanding the rule against champertuous conveyances.—*Mackintosh v. Stewart*, 328.

CHARGE OF COURT.

For instructinos in particular actions or crimes, see that title.

1. Weight and Sufficiency of Evidence.

Same; Weight of Evidence.—Charges which lay undue emphasis or call particular attention to parts of the evidence, are properly refused.—*Reid v. The State*, 14.

Same; Sufficiency of Evidence.—A charge that before the jury could convict they must be satisfied to a moral certainty, not only that the proof was consistent with defendant's guilt, but that it was wholly inconsistent with every other rational conclusion, and that unless the jury were so convinced by the evidence of his guilt that they would venture to act upon that conviction, etc., was properly refused as argumentative.—*Jones v. The State*, 63.

Charge of Court; Mistrial.—Since a mistrial might be the result of such a situation, a charge asserting that the verdict should be for the defendant if any juror did not believe plaintiff's evidence to be reasonable, was properly refused.—*McLaughlin v. Beyer*, 427.

Charge of Court; Credibility of Witness.—Where other witnesses for plaintiff had testified differently to the same fact, a charge requested by defendant that plaintiff vouched for the truthfulness of the witness N when he placed him on the witness stand, was misleading in the absence of a statement that plaintiff was not, concluded on the facts as to which N testified to.—*Jebeles-U. Conf. Co. v. Booze*, 456.

Charge of Court; Weight and Sufficiency of Evidence.—A charge asserting that plaintiff could not recover damages, "If, after a careful consideration of all the evidence, any of the individual jurors is reasonably satisfied from any material part of the evidence that he ought not to recover," was not improperly refused, where the main question litigated was as to the kind and amount of damages rather than the right to recover it all; hence, the charge in this case was calculated to mislead the jury, although unanimity is essential to a verdict.—*B. R. L. & P. Co. v. Goldstein*, 517.

2. Assuming Facts.

Charge of Court; Assuming Facts.—A charge assuming that defendant had a good character was properly refused as that was a question for the jury under the evidence, notwithstanding there was no conflict.—*Reid v. The State*, 14.

3. Covered by Those Given.

Charge of Court; Covered by Instructions Given.—It is not error to refuse requested instructions covered by written instructions given.—*Jones v. The State*, 63.

4. Effect of Evidence.

Same; Effect of Evidence.—The court is not required to instruct the jury that there is or is not any evidence of a particular fact.—*McLaughlin v. Beyer*, 427.

Charge of Court; Necessity of Requesting; Misapplying Evidence. Where evidence is competent only on a part of the issues, and its misapplication by the jury is feared, an instruction limiting it to such issues should be requested.—*Sloss-S. S. & I. Co. v. Mitchell*, 576.

5. Misleading.

Same; Misleading.—A charge that witnesses are separated so as to ascertain whether the facts as related by the witnesses are true, and if the jury believe their statements are materially variant,

CHARGE OF COURT—Continued.

they are authorized to reject all of such evidence, was misleading if not positively erroneous.—*McLaughlin v. Beyer*, 427.

Same; Misleading and Argumentative.—A charge asserting that each party is entitled to the independent judgment of each juror, and unless all of the jury are reasonably satisfied of the truthfulness of the witnesses for plaintiff, they must find for defendant, is misleading and argumentative.—*Ib.* 427.

Charge of Court; Misleading; Instructions.—As to whether or not an instruction was calculated to mislead the jury, reference must be had to the evidence.—*Bowles v. Lowery*, 603.

6. Argumentative.

Same; Argumentative.—A charge that an accusation of slander is easy to be brought and hard to defend, though the defendant be innocent, was properly refused as argumentative.—*McLaughlin v. Beyer*, 427.

7. Needing Constructions.

Same; Needing Construction.—Where a requested instruction needs some construction to prevent its being misleading, its refusal is justified.—*Jebeles-C. Conf. Co. v. Booze*, 456.

CODE SECTIONS CITED OR CONSTRUED.

- 390. Realty Inv. Co. v. City of Mobile, 184.
- 1030. (1896) Ashurst v. Ashurst, 401.
- 1048. State ex rel. Bibb v. Town of Warrior, 642.
- 1067. State ex rel. Bibb v. Town of Warrior, 642.
- 1171. Allen v. State, ex rel. Rowe, 383.
- 1230. Board of Commissioners v. Orr, 308.
- 1251. Allen v. State ex rel. Rowe, 383.
- 1423. Realty Inv. Co. v. City of Mobile, 184.
- 2459. Ebersole v. Fields, 421.
- 2664. B'ham R. L. & P. Co. v. Nicholas, 491.
- 2707. (1876) Jackson L. Co. v. Bass, et al., 172.
- 3095. Dixie Grain Co. v. Quinn, 208.
- 3095. Moore, et al. v. Empire L. Co., 344.
- 3410. Ashurst v. Ashurst, 401.
- 3421. Mackintosh v. Stewart, 328.
- 3500. Montgomery B. & T. Co. v. Walker, 368.
- 3735-44. Cruise v. Sorrell, 237.
- 3746. Webb v. Gray, 408.
- 3748. Webb v. Gray, 408.
- 3843. Howard v. Martin, 613.
- 3846. Howard v. Martin, 613.
- 3910. Sub. 2. Twin Tree L. Co. v. Day, 565.
- 3980. B'ham C. & I. Co. v. Doe ex dem. Arnett, 621.
- 3986. Williams v. Lyon, 531.
- 3995. Williams v. Lyon, 531.
- 4196. Clements v. Faulk & Co., 219.
- 4231. Combs v. Greene, et al., 325.
- 4293. Cruise v. Sorrell, 237.
- 4295. Cruise v. Sorrell, 237.
- 4846. McLaughlin v. Beyer, 427.
- 4896. Presnall v. Burgess & Co., 263.
- 5232. Combs v. Greene, 325.
- 5367. Webb v. Gray, 408.
- 5367. Hanchey v. Brunson, 453.

CODE SECTIONS CITED OR CONSTRUED—*Continued.*

- 5445. Moore, et al. v. Empire L. Co., 344.
- 5448. Moore, et al. v. Empire L. Co., 344.
- 5453. State ex rel. Blish v. Thomas, 665.
- 5476. Ex parte So. Ry. Co., 486.
- 5955. Thornton v. Esco, 241.
- 7084. Sanders v. State, 35.
- 7099. Parsons v. Age Herald Pub. Co., 439.
- 7124. Parsons v. Age Herald Pub. Co., 439.
- 7131. Realty Inv. Co. v. City of Mobile, 184.
- 7149-52. B'ham R. L. & P. Co. v. Nicholas, 491.
- 7251. Adams v. State, 58.

CONFESSIONS.

See Evidence, § 1.

CONSTITUTIONAL LAW.

See Statutes.

1. Right of Accused to be Heard.

Constitutional Law; Right to Be Heard.—Section 6 of the Bill of Rights is intended to guarantee to a defendant the right to have his case argued and properly presented to the court and jury by himself and by counsel, and does not authorize him to make a statement of facts outside the evidence. The right thus guaranteed must be exercised at the proper time and in the proper manner; hence, where a defendant had testified as a witness, he had no right to make statements not amounting to legal evidence until after the evidence was closed, and then if he wished to be heard he should claim that right during the time allotted to him, usually between the opening and closing arguments for the state.—*Jones v. The State*, 63.

2. Due Process.

Constitutional Law; Due Process; Rules of Evidence.—Legislation providing that proof of one fact shall constitute prima facie evidence of the main fact in issue, where there is some rational connection between the fact proved and the fact presumed, and where it does not operate to preclude the presentation of the defense to the main fact, thus presumed, is not a denial either of due process of law, or the equal protection of the law, or trial by jury.—*Ex parte Woodward*, 97.

Same.—The provision of section 4, Acts 1909, p. 63, is not a denial of due process of law, notwithstanding the rule in this state that a person may not testify as to his uncommunicated motives, purposes or intentions; the relation between the presumption, and the facts and circumstances upon which it is predicated being natural and rational, and defendant being permitted to show facts and circumstances bearing on his motives, purposes and intent, and hence, not being deprived of his right to present his defense to the main issue.—*Ib.* 97.

Constitutional Law; Due Process; Banks and Banking.—The fourteenth amendment to the Federal Constitution does not deprive the state of the power to determine by what process legal rights may be asserted or legal obligations enforced; hence, the provisions of Acts 1911, p. 59, sec. 10, do not work a deprivation of property without due process of law.—*Montgomery B. & T. Co. v. Walker*, 368.

3. Vested Rights.

Same; Vested Rights; Intoxicating Liquors; Power to Control.—There can be no vested right or unqualified, irrevocable privilege to

CONSTITUTIONAL LAW—Continued.

traffic in intoxicating liquors, and the state may close all possible avenues through which its prohibition laws may be evaded or violated.—*Ex parte Woodward*, 97.

4. Construction.

Constitutional Law; Construction.—Constitutions are usually framed in a more general language than legislative acts, and should not always be construed by the same rules of construction, not generally being subject to the same technical constructions as the statutes.—*Realty Inv. Co. v. Mobile*, 184.

5. Class Legislation.

Constitutional Law; Class Legislation; Classification.—Statutes may classify and discriminate between classes if the classification is founded on distinctions reasonable in principle and having just relations to the object to be accomplished.—*Board Coms. Mobile v. Orr*, 308.

6. Departments of Government.

Constitutional Law; Legislative Power; Limitation.—The legislature of a state possesses all the legislative power which resides in the state under the Federal Constitution, except as that power is expressly or implied limited by the State Constitution.—*State ex rel. Wilkinson v. Lane*, 646.

Same; Departments of Government; Municipal Officers.—Sections 42-3 of the Constitution do not apply to municipal government, or to town or city officers, and there is no constitutional objection to placing executive, administrative or legislative duties upon a municipal officer, and the mere fact that he is a judicial officer does not preclude him from serving the municipality as an executive.—*Id.* 646.

Same; Statutes; Legislative Motive.—The motive of the legislature in enacting a statute is not a proper subject for judicial examination.—*Id.* 646.

CONSTITUTION CITED OR CONSTRUED.

Section.

- 6. Jones v. State, 63.
- 42. State ex rel. Wilkinson v. Lane, 646.
- 43. State ex rel. Wilkinson v. Lane, 646.
- 150. State ex rel. Wilkinson v. Lane, 646.
- 170. Realty Inv. Co. v. City of Mobile, 184.
- 222. Realty Inv. Co. v. City of Mobile, 184.
- 227. B'ham R. L. & P. Co. v. Smyer, 121.
- 235. B. R. L. & P. Co. v. Smyer, 121.
- 279. State ex rel. Wilkinson v. Lane, 646.
- 285. Realty Inv. Co. v. City of Mobile, 184.

CONTINUANCE.

See Criminal Law, § 2.

CONTRACTS.

See Sales.

1. Rescission.

Contracts; Sale of Stock; Rescission; False Representation.—Where an agent, in order to sell certain stocks of his corporation, made false representations to a third person in the presence of the complainant, who immediately opened negotiations to purchase certain shares thereof through the same agent, and the agent sold him

CONTRACTS—Continued.

certain shares with knowledge that he had been present at the former interview, and had heard the false statements made to the third party, it was the duty of the agent to inform complainant of the true facts before selling him the stock, and if he failed to do so, the fraud was the same as though the representations had been made to complainant in the first instance, amounted to a re-affirmation of them, and thus entitled complainant to rescind.—*So. St. F. & C. I. Co. v. Cromartie*, 295.

2. Third Persons.

Contracts; Third Persons.—The agreement of a bank with a purchaser, after the execution of the mortgage to it, to pay the balance due to the vendor, insured to the benefit of the vendor.—*Mackintosh v. Stewart*, 328.

COURTS.**1. Supervisory Jurisdiction.**

Courts; Supervising Appeals; Questions of Fact.—The Supreme Court may review and revise a decision of the Court of Appeals upon questions of jurisdiction and law, but it will not review the findings or conclusions on the facts, or review the facts for the purpose of revising its application of the law thereto.—*Ex parte State*, 4.

Courts; Supervisory Jurisdiction; Certiorari to Court of Appeals; Time.—Unless application for certiorari to review a decision of the Court of Appeals is made within fifteen days after final action, on application for rehearing by the Court of Appeals, the application for certiorari comes too late, and will be dismissed. (Supreme Court Rule 43.)—*Ex parte Barlew*, 88.

Courts; Supervisory Jurisdiction; Certiorari; Writ.—Where a relator could have advanced the same argument as to why the judgment of the Court of Appeals should have been sustained, on a writ of certiorari sued out by the state, he was not, after a reversal of that decision by this court entitled to a writ of certiorari to review the determination of the Court of Appeals affirming the judgment in accordance with the decision of this court.—*Ex parte Livingston*, 94.

2. Stare Decisis.

Courts; Stare Decisis.—Under the rule of stare decisis expressions of opinions arguendo in a decided case do not bind the court.—*Realty Inv. Co. v. Mobile*, 184.

COURT RULES.

43. Sup. Ct. *Ex parte Barlew*, 88.

28. Ch. Pr. *McLaughlin v. Beyer*, 427.

COVENANTS.

Covenants; Construction; "Grant, Bargain, Sell and Convey."—Unaided by statute the words, "grant, bargain, sell and convey" operate as a conveyance, but warrant nothing as to title, and the grantee takes only such title, interest or estate as the grantor had at the time the conveyance was executed and delivered.—*Macintosh v. Stewart*, 328.

Same; Seisin.—An express covenant that the grantor is seised of an indefeasible estate in fee, is a covenant for that complete title which is formed by the union in one person of right and possession.—*Ib.* 328.

COVENANTS—*Continued.*

Same; Breach.—A covenant that the grantor is seised in fee of an indefeasible estate, is broken as soon as made, if there is an outstanding superior title, or an encumbrance diminishing the value or enjoyment of the land; or generally speaking, if the grantor has not substantially the very estate both in quality and quantity which he professes to convey by the deed.—*Ib.* 328.

Same; Implied Covenants; Statute.—Under section 3421, Code 1907, the covenant of seisin is to be taken subject to the same limitations as the covenants against encumbrances, and hence, implied covenants are limited to the acts of the grantor and those claiming under him, and do not extend to defects of title anterior to the conveyance to him.—*Ib.* 328.

Same.—Covenants of title are always intended to guard against titles adverse to the covenantor, but where they result from the wrongful acts of strangers subsequent to the conveyance, such covenants are not effected.—*Ib.* 328.

Same; "Suffered."—Under section 3421, Code 1927, an implied covenant of an indefeasible estate in fee for both right and possession, as against any act done or "suffered" by the grantor, is broken by an adverse possession which by limitations has ripened into title at the time of the conveyance, and, since adverse possession does ripen into title, it is to be regarded as an actual estate or interest, and therefore, an encumbrance on the title from the commencement of the covenant. The word "suffered" not being capable of being confined to the voluntary acts of the owner.—*Ib.* 328.

Same; Breach; Action for.—An averment that various persons were in the actual adverse possession of particularly described parts of the land at the time of the conveyance to complainant, without showing when such possession began is a sufficient allegation of the breach, at the moment of conveyance, of the covenant for seisin for both right and possession as against wrong doers implied by section 3421, Code 1907, or of the covenant for seisin in its narrow sense of mere actual possession, and prima facie states a case of the grantee's loss of possession and title through the fault of the grantor.—*Ib.* 328.

Same; Presumption; Burden of Proof.—A grantor conveying with a covenant as implied under section 3421, Code 1907, will be presumed to have had knowledge of the facts and effect of an adverse possession, and because of such presumed knowledge of the title which he undertakes to assure, he has the burden of pleading and proving such fact if such adverse possession has ripened into an indefeasible title before he claimed the land.—*Ib.* 328.

Same; Nature of Remedy.—The remedy on an implied covenant is always administered for the purpose of protecting the vendor from losing both his land and the price, and at the same time securing to the purchaser the full benefit of his contract.—*Ib.* 328.

Same; Grantee's Knowledge.—A grantee's notice or knowledge of an encumbrance or of a paramount title, does not impair his right of recovery upon covenants of warranty which cover known as well as unknown encumbrances or defective titles, however full his knowledge may be; the statute expressly provides that the grantee may assign breaches as if such covenants were expressly inserted.—*Ib.* 328.

Same; Recovery; Effect as Rescission.—A recovery in an action for breach of a covenant for title works a rescission pro tanto by revesting in the covenantor the title which he has conveyed, such as it is.—*Ib.* 328.

CRIMINAL LAW.

For particular crimes, see that title.

1. Misconduct of Juror.

Same; Misconduct of Jury; Separation.—Where it was not shown that he mingled with outsiders it was not error, in a murder trial, to refuse to quash the panel of jurors because one of them separated from the others.—*Sanders v. The State*, 35.

2. Continuance.

Criminal Law; Continuance; Discretion.—The granting of a continuance in a criminal case on account of the absence of a witness is a matter within the discretion of the trial court.—*Sanders v. The State*, 35.

3. Change of Venue.

Criminal Law; Change of Venue; Local Prejudice.—The facts considered and it is held that the trial court will not be reversed for denying a change of venue two months after the cause was reversed in the Supreme Court, twelve months after the trial in the trial court, and sixteen months after the commission of the homicide, especially where the state introduced affidavits tending to show that any prejudice which had existed had subsided before the application for the change of venue, and that a fair and impartial trial could reasonably be expected.—*Adams v. The State*, 58.

Same.—The defendant seeking a change of venue on account of local prejudice has the burden to show that a fair and impartial trial could not be reasonably expected at the time that the application is made, and this rule is not changed by section 7851, Code 1907, as amended by Acts 1909, p. 212.—*Ib.* 58.

DAMAGES.

In particular actions, see that title.

1. Elements.

Damages; Elements.—The law can furnish no standard for measuring damages for physical pain and mental suffering, and must therefore, leave such compensation to the sound discretion of the triers of the facts, and yet such damages, when recoverable, are actual, and when a plaintiff is entitled thereto they must be awarded.—*B. R. L. & P. Co. v. Coleman*, 478.

2. Exemplary.

Same; Exemplary; Jury Question.—Exemplary damages are never recoverable as a matter of right, it being a question for the jury whether they shall be allowed at all, and if so, as to the amount, but the jury must exercise their discretion in the light of the evidence.—*B. R. L. & P. Co. v. Coleman*, 478.

Same; Instructions.—The charge asserting that if the jury believed that plaintiff was entitled to recover, they might award him no more than nominal damages, if, in the exercise of a sound discretion they believed this sufficient, was calculated to confuse and mislead the jury, and was properly refused.—*Ib.* 478.

3. Duty to Reduce.

Damages; Duty to Reduce.—It was the duty of plaintiff, owner of the premises overflowed, to reduce as far as he reasonably might the diminished rental value of the premises by restoring them to their full or former rental value if it could be done with reasonable effort, expenditure and expedition, and if he had the means and

DAMAGES—Continued.

ability to do so, and neglected this duty for an unnecessary period, his recovery would abate proportionately.—*Sloss-S. S. & I. Co. v. Mitchell*, 591.

DEEDS.**1. Title Acquired.**

Deeds; After Acquired Title.—Where two of eight children of a deceased owner of land conveyed their undivided interest in the land, with covenants of warranty as to title, and one of the other eight children subsequently died, the interest of the grantors in the land as the heirs of such other child did not pass under the deed to their grantee, since the covenants referred only to the interest which they intended to and in fact did convey.—*Clements v. Faulk & Co.*, 219.

2. Attestation.

Deeds; Attestation; Notary's Acknowledgment.—Where the execution of a deed was proven by a notary, his certification of acknowledgment is properly allowed to stand as an attestation by him as a witness.—*Spink v. Guarantee B. & T. Co.*, 272.

3. Construction.

Deeds; Construction; Qualifying Terms.—The deed examined and held to convey an undivided half interest in the single tract in section 30, the phrase undivided half, qualifying only that tract and not the other lands described by government survey.—*Vandegrift v. Shortridge*, 275.

Same; Favorable to Grantee.—Where a deed is fairly doubtful it will be construed most strongly against the grantor and in favor of the grantee.—*Ib.* 275.

Deeds; Bargain and Sale; Construction.—A deed of bargain and sale for a valuable consideration is construed most strongly against the grantor, and, if it contains conflicting parts, all reasonable effort should be exerted to reconcile it, and if there is an utter inconsistency between the two clauses the last clause must give way to the first.—*Vizard v. Robinson*, 349.

Deeds; Parties.—Where no names of persons purporting to be grantors are set out in the body of the deed, the identity of the persons purporting to grant and convey is clear and certain where their names are signed at the appropriate place to the deed, and this is true as well with respect to the warranty and other features, although the pronoun "me" is employed in the acknowledgment of receipt of payment of the consideration, and the pronoun "I" in the granting clause and in the warranty and other features.—*Bowles v. Lowery*, 608.

4. Delivery.

Deeds; Delivery; Date; Presumptions.—In the absence of evidence showing the actual date of the delivery of the deed, the legal presumption is that it was delivered on the day of its date and acknowledgment.—*Daughdrill v. Lockhart*, 338.

DEPOSITIONS.

Depositions; Admissibility; Objection; Waiver.—Where the complainant made no objection to a consideration of depositions taken on behalf of respondents, but introduced as a part of his own evidence testimony given by each respondent on the cross-examination, the court could properly consider the deposition, although they were not certified properly.—*Smith v. Morris*, 279.

DESCENT AND DISTRIBUTION.

Descent and Distribution; Widow's Share.—Upon a decedent's death, leaving no minor children, and leaving land of less value than \$2,000, and less than 160 acres in area, the absolute fee in such land passed to his widow, notwithstanding there has been no proceeding setting such lands apart to her as her homestead exemption.—*Combs v. Greene*, 325.

DYING DECLARATIONS.

See Homicide, § 1b.

EJECTMENT.

Executors and Administrators; Right of Widow; Ejectment.—Where one acquires title by adverse possession, his widow as such, can maintain ejectment for it if it is so related to the place of his last residence as to make it subject to the widow's quarantine right.—*Bowles v. Lowery*, 608.

Ejectment; Pleading; Demurrer.—A plea disclaiming possession in part of the premises sued for, in that "he disclaimed possession of that part of the land sued for easterly of plaintiff's fence, and as to all of the remainder of the premises sued for defendant says he is not guilty," was demurrable in attempting to disclaim as to part of the premises not described with sufficient certainty, and in pleading not guilty as to the remainder, which rendered both the disclaimer and the general issue uncertain.—*Howard v. Martin*, 613.

Same; Disclaimer; Issues.—A disclaimer in ejectment is not strictly a pleading, and a plaintiff cannot be required to take issue thereon though he may do so if he desires, and as to the land disclaimed he may take judgment without costs, hence, it is essential that the disclaimer be certain.—*Ib.* 613.

Same; Inconsistent Pleas.—Pleas of disclaimer in ejectment and of denial of possession are incompatible defenses, and cannot be pleaded together.—*Ib.* 613.

ELECTIONS.

Elections; Contests; Grounds.—Where the incompetency of a clerk and inspector of an election does not affect the result of an election, their incompetency is not ground for contest.—*State, ex rel. Bligh v. Thomas*, 665.

EMINENT DOMAIN.

Eminent Domain; Rights of Abutting Owners.—Section 235, Constitution 1901, does not authorize an abutting owner to recover for inconveniences in loading and unloading goods at the curbing occasioned by the construction of a street railway track in the street abutting the premises.—*B. R. L. & P. Co. v. Smyer*, 121.

Same; Street Use; Double Track.—The laying of a second street car track in a city street thirty-four feet wide, to afford double track facilities, is not such a use of the street as entitles the abutting owner to enjoin the laying of such track, and does not constitute such additional burden or servitude as to entitle the abutting owner to compensation, notwithstanding such laying of such track, thereby renders inconvenient such abutting owner's use of the street in loading and unloading goods at the curbing.—*Ib.* 121.

Same.—An injury which an abutting owner sustains on account of increased danger of collision with passing cars on account of the construction of an additional car track on the street is one suffered in common with the general public, and cannot be made the basis of a private action.—*Ib.* 121.

ESTOPPEL.

Estoppel; Inducement to Act.—The respondent in this case held not to be estopped to sue for the breach of a contract of sale because after the sale he asserted that he was satisfied therewith.—*Farrow v. Sturdivant Bank*, 283.

EQUITY.

1. Bill.

(a) Multifarious.

Equity; Bill; Multifariousness.—A bill by a complainant who is a joint owner of land devised in trust to her and her two brothers, seeking to cancel a conveyance of her interest in the land to one of her brothers on the grounds of fraud and misrepresentation, and to have one who has acted as agent of the trustee remove from his position is multifarious, since no connection is shown between the two causes of action.—*Pierson v. Danley*, 163.

Same; Multifariousness.—A bill by the owner of land to redeem from a timber mortgage and to cancel a conveyance of the timber by a purchaser at sheriff's sale, brought against such purchaser and its grantee, as well as to enjoin the grantee from maintaining a turpentine orchard in the timber, was not multifarious as to the joinder of respondents and the relief prayed.—*Dixie Grain Co. v. Quinn*, 208.

Equity; Pleading; Multifariousness.—Under section 3095, Code 1907, a bill seeking the cancellation of a deed as a cloud upon title, and charging it to have been obtained by fraud, and in violation of the duty of an agent, and asking that a trust be declared for the benefit of the complainant is not multifarious.—*Moore v. Empire L. Co.*, 344.

2. Demurrer.

Equity; Demurrer; Effect.—On demurrer the allegations of the bill must be taken as true.—*Dixie Grain Co. v. Quinn*, 208.

Equity; Pleading; Demurrer.—Although a bill may be demurrable as to a part of the relief sought against one respondent, such defect is not reached by a demurrer addressed to the bill as a whole, and hence, such demurrer was properly overruled.—*Id.* 208.

Same; Questions Raised.—Whether the purchaser of property then covered by a mortgage containing a power of sale, made due inquiry as to whether the power had been executed, is a matter of defense, and cannot be raised by demurrer.—*Id.* 208.

Same; General Demurrer; Bill Good in Part.—A bill seeking both to have title quieted and to have a trust declared in the same land, which is good as a bill to quiet title, is not subject to a general demurrer for want of equity, regardless of whether it is sufficient as a bill to declare a trust.—*Moore v. Empire L. Co.*, 344.

3. Relief Granted.

Same; Relief.—Equity will not use its powers to accomplish a useless purpose.—*Dixie Grain Co. v. Quinn*, 208.

4. Prayer.

Same; General Prayer; Mortgages.—Although the special prayer of the bill was for redemption from mortgage foreclosure and reconveyance to the mortgagor, yet where its general purpose was to relieve complainant from the cloud upon title cast by the deed executed upon foreclosure, relief by cancelling such deed as a cloud on complainant's title could be granted under the general prayer for relief, as the allegations showing the invalidity of such deed, coupled with

EQUITY—Continued.

the general prayer for relief, were sufficient to warn respondent of such ultimate relief.—*Dixie Grain Co. v. Quinn*, 208.

5. Submission.

Equity; Submission; Pleadings As Evidence.—Where the complainant submitted on the bill and the admissions contained in the answer, and in the answers to interrogatories propounded by the bill, respondent was entitled to have the entire answer introduced in evidence.—*Daughdrill v. Lockhart*, 338.

6. Joinder of Parties.

Same; Parties; Joinder.—Where the bill alleges that all of the parties respondent claim or are reputed to claim an interest in the land jointly, there is no misjoinder.—*Moore v. Empire L. Co.*, 344.

Same; Fraud; Joint Participants.—In a bill charging fraud and breach of trust, parties who are alleged to have participated in the transaction are proper, if not necessary parties to the bill.—*Id.* 344.

7. Multiplicity of Suits.

Equity; Multitude of Suits.—Equity abhors a multitude of suits, and will settle all matters in dispute in one suit, when it can be done under its rules reasonably construed.—*Enterprise L. Co. v. First Nat. Bank*, 388.

EVIDENCE.

In particular actions and crimes, see that title.

1. Confessions and Admissions.

Evidence; Confessions.—A voluntary confession by defendant that he purposely shot deceased, his wife, was admissible.—*Aaron v. The State*, 1.

Evidence; Confessions.—Although confessions made by a defendant to an officer having him in charge should be received with caution, they are nevertheless admissible if it appears that they were made freely and voluntarily.—*Gilmer v. The State*, 23.

2. Declarations of Accused.

Evidence; Declaration of Accused.—Evidence of declarations in his own behalf made by one accused of homicide is not admissible, unless of the res gestæ of the transaction.—*German v. The State*, 11.

Evidence; Exculpatory Declarations.—Where a defendant was being prosecuted for killing his wife, the fact that five or ten minutes after the shooting defendant was heard to exclaim, "There, Lord, I have killed my wife, and it was not my intention to do it," and that while walking along the road thereafter, he was crying, was not admissible as part of the res gestæ, and were but exculpatory explanations.—*Simon v. The State*, 90.

2½ Facts or Conclusions.

Evidence; Facts or Conclusions.—Where the action is for injury to property, witnesses should not generally be allowed to state that the property was or is damaged, but should state the conditions under the different circumstances and leave the conclusion to the jury.—*Sloss-S. S. & I. Co. v. Mitchell*, 576.

3. Expert and Opinion.

Evidence; Opinion; Nature of Wound.—Expert knowledge not being necessary to justify one in testifying as to the range of wounds, it was competent for one who saw deceased immediately after he

EVIDENCE—Continued.

was shot, and who examined the wound, to testify that the large wound on the right of decedent's spinal column went straight in, and the small wound on the edge of the shoulder blade ranged upward and stopped at the point of his shoulder, and that the word on the left of his spinal column ranged to the left and stopped at the point of the hip.—*Reid v. The State*, 14.

Evidence; Opinion; Admissibility.—Where a witness had testified that certain peculiar tracks of a mule led from the scene of the murder to defendant's house, and that the feet of a mule belonging to defendant had certain peculiarities, and that he had examined the feet of a mule belonging to another person near whose house the murder was committed, and that they did not possess those peculiarities, it was error to permit the witness to state whether the mule belonging to such other person could have made the tracks described, as that was a question for the jury to determine from the evidence.—*Pope v. The State*, 19.

Same; Communications Signed by Deceased.—The admission of a communication to a newspaper signed by deceased and others as to certain publications in the paper, without showing who wrote the communication, was not erroneous; it having been offered by defendant without objection on the part of the state, and was signed by deceased, together with others.—*Jones v. The State*, 63.

Same; Opinion; Cross-Examination.—Where defendant's mother as a witness for him had testified as to his mental condition, stating that he was crazy, it was competent to permit the state to prove by her that she had never made any attempt to have him adjudged insane or placed in an asylum, as much latitude is permitted on cross-examination for the purpose of ascertaining the credibility of the witness's testimony.—*Ib.* 63.

Same; Expert; Sanity; Qualification.—In order for a non-expert to be competent to express an opinion that a person is insane he must be shown to have had a continuous acquaintance with him of such intimacy as to enable him to form an accurate and trustworthy opinion as to his mental status.—*Ib.* 63.

Same.—Whether a non-expert is shown to have the qualifications sufficient to authorize him to give an opinion whether another person is insane, is a question addressed to the court in the exercise of a sound discretion, and not reviewable on appeal, except for palpable abuse.—*Ib.* 63.

Same.—Where the non-expert said that he had known defendant as a speaking acquaintance for about a year, and had known him intimately for about a month, but did not state the extent of their association except as to what happened during the three different days of that time, the court properly ruled that such a witness did not have the proper qualifications to give an opinion as to the insanity of the defendant.—*Ib.* 63.

Same; Opinion; Knowledge Essential.—While a witness may testify whether certain things may be seen from a given point, it is necessary that he shall actually know whether the things could have been thus seen, and that his testimony is not a mere expression of opinion.—*Republic I. & S. Co. v. Passafume*, 463.

Evidence; Experts; Competency of Employee.—Where a particular employment required technical skill, an expert shown to have a general acquaintance with the employment, and who knows the particular services incident thereto, and has observed a particular person in the course of the employment, may testify that such person is competent or incompetent; but such opinion is not allowable except

EVIDENCE.—Continued.

in instances where the jury cannot be assumed to understand the subject, and able to reach an intelligent conclusion of their own without expert aid.—*Owen v. A. G. S. R. R. Co.*, 552.

4. Reputation or Character.

Evidence; Reputation of Accused.—The good reputation which a defendant may establish must be general, and it is not error therefore to exclude testimony as to how defendant "stood with the law-abiding people;" nor is it error to exclude a question as to whether witness knew defendant's character for peace and quiet in the neighborhood, as being too narrow.—*Watson v. The State*, 53.

4½. Res Gestæ.

Evidence; Res Gestæ; Agency.—Where the action was for damages for assault and battery committed by the employees of defendant corporation while acting within the scope of their employment, it was not error to admit evidence that other parties were arrested shortly after plaintiff was shot, where the shooting and the arrest were closely related, and the court limited such evidence to proof of agency existing between defendant and the persons who shot plaintiff.—*Republic I. & S. Co. v. Passafume*, 463.

5. Diagrams.

Evidence; Diagram.—The purported diagram of the interior of the car in which a homicide was committed, as corrected by the testimony of the conductor, was admissible in evidence.—*Jones v. The State*, 63.

Same.—Where witnesses testified as to the diagram of the interior of the car in which the homicide was committed, but were not positive as to its correctness, and referred to it for the purposes of demonstration, but such diagram was not offered in evidence until verified and corrected by the testimony of the conductor, it was admissible, and it was for the jury to say whether it was correct, whether the correction of it was properly made, whether the testimony relative thereto was accurate and the extent to which they would be aided thereby.—*Id.* 63.

6. Parol to Vary Writing.

Evidence; Parol; Deeds.—Where a deed of bargain and sale conveyed an absolute title to the timber on certain lands described, parol evidence was not admissible to show that, at the time of the sale, it was verbally agreed that the grantee's title to the timber was limited to eight years from the date of the deed, and that at the expiration of that time, all the grantee's interest in the timber was forfeited to the grantor.—*Vizard v. Robinson*, 349.

Evidence; Parol Evidence; Intention.—In aid of the interpretation of the acknowledgment, evidence that the signers of a deed, except the grantee, were all of the children of one of the grantors, is admissible; such evidence not contravening the rule against direct parol evidence of intention.—*Bowles v. Loucory*, 603.

7. Best and Secondary.

Same; Secondary Evidence; Letters.—After showing that the recipient, in whose possession the letters were last seen, was out of the state, it was competent to prove the contents of such letters by secondary evidence.—*Webb v. Gray*, 408.

Evidence; Best and Secondary.—Where title was sought to be deraigned through an execution sale, and the execution could not be

EVIDENCE—Continued.

found in the files, the execution docket of the court showing an execution on the judgment against the land in question, its advertisement, sale and deed, was admissible.—*Williams v. Lyon*, 531.

8. Hearsay.

Evidence; Hearsay.—Hearsay statements are not admissible as tending to prove plaintiff's general character, or of the truth of the words alleged to constitute the slander.—*Webb v. Gray*, 408.

Evidence; Hearsay; Res Inter Alios Acta.—Where a defendant newspaper published certain observations of "a citizen" concerning plaintiff, which were written by a witness for defendant who had no connection either with defendant or the newspaper, a question asked him on cross-examination if he had not told several persons that his article referred to plaintiff, was not only objectionable as hearsay, but as calling for matter *res inter alios acta*.—*Parsons v. Age H. Pub. Co.*, 439.

Same; Hearsay; Declaration by Foreman.—What a foreman of plaintiff told a witness after a plaintiff had been injured as to the place where plaintiff was working when injured, was hearsay and inadmissible.—*Owen v. A. G. S. R. Co.*, 552.

8½. Documentary.

Same; Documentary Evidence; Judicial Record.—Under sections 3986 and 3995, Code 1907, the execution docket of the court was admissible to show an execution and the subsequent proceedings thereon, where the execution could not be found.—*Williams v. Lyon*, 531.

9. Judicial Notice.

Evidence; Judicial Notice; Effects of Disease.—The court does not take judicial notice of the effect certain diseases will cause.—*Empire Imp. Co. v. Lynch*, 473.

Evidence; Judicial Notice; Official Proceedings.—State courts have no judicial knowledge as to whether plans and specifications for a bridge across a navigable stream was submitted to and approved by the Chief of Engineers and the Secretary of War as required by the Federal authorities; this being a fact to be determined by the jury from the evidence.—*Mauldin v. C. of Ga. Ry. Co.*, 591.

10. Cumulative.

Evidence; Cumulative Evidence.—Where the court permitted the conductor, who was in charge of the car which is alleged to have injured plaintiff, to testify that there was no unusual jerk of the car, nor any jerking after it was stopped, other than the ordinary movement of the car, after it was stopped, the defendant got all it was entitled to in the way of an opinion, and was not entitled to have the conductor answer the question, "was the stop violent enough to cause you to lose your footing on the back end?"—*B. R. L. & P. Co. v. Mayo*, 525.

EXEMPTIONS.

Exemptions; Waiver.—Where the complaining creditor's judgment contains a waiver of exemptions as to personal property, and the machinery on the land was treated by the debtor as personalty, a vacation of a conveyance of the land, including a mill with a boiler, engine, etc., located thereon as being in fraud of complainant's judgment, had the effect of rendering such machinery subject to complainant's claim.—*Hamner v. Freeman*, 109.

FIXTURES.

Fixtures; Mill Machinery.—The mere use of mill machinery in connection with the business of operating a mill does not necessarily so annex the machinery to the realty as to constitute it a fixture, the question depending largely on the intention of the party.—*Hanvey v. Gaines*, 288.

FRAUDS; STATUTE OF.

Frauds; Statute; Executory Agreement.—The statute does not apply to executed contracts, and hence, a mortgage executed pursuant to a prior parol agreement to answer for the debt of another is not void under the statute of frauds.—*Minchener v. Henderson*, 115.

Frauds; Statute; Pleading; Necessity.—Where the pleading itself affirmatively shows that the contract sought to be specifically performed violates the statute of frauds, that question may be raised by demurrer as well as by plea.—*Gachet v. Morton*, 179.

FRAUDULENT CONVEYANCES.

Fraudulent Conveyances; Evidence; Sufficiency.—Where the respondent filed a cross bill to cancel a deed from respondent's debtor to the debtor's wife, which deed conveyed a certain lot as a gift, in answer to a bill by the wife to declare a mortgage on said lot void as security for the husband's debt, the evidence was sufficient to sustain the finding that prior to the conveyance by the debtor to his wife he had agreed to give the creditor a mortgage on the lot for money advanced by the firm composed of the debtor and creditor, to enable the debtor to build a house on said lot.—*Minchener v. Henderson*, 115.

Same; Pleading; Variance.—Where there was no variance between the allegations of the cross bill, and the evidence on the controlling issue as to whether a deed from the debtor to his wife was fraudulent, the fact that there were variances between the pleadings and proof as to other distinct equities in the case, could not have the effect to deprive the creditor of the right to a cancellation of the deed.—*Ib.* 115.

Fraudulent Conveyance; Bill to Set Aside; Right of Action.—A judgment creditor whose execution has been returned "no property found" may maintain a bill under section 4293, Code 1907, to set aside a conveyance as void as made to hinder, delay or defraud, without being required to resort to a bill under sections 3735-3744, Code 1907.—*Cruise v. Sorrell*, 237.

Same; Sufficiency.—A bill to set aside a fraudulent conveyance which alleged complainant to be a judgment creditor of the grantor in the deed, the issuance of execution and its return "no property found," the relation of husband and wife between the grantor and the grantee in the deed that the consideration recited was simulated and fictitious, that the property greatly exceeded in value the consideration recited and that it constituted substantially all the grantor's property and that it was made with an actual intent to hinder, delay and defraud the grantor's creditors, of whom complainant was one, was sufficient.—*Ib.* 237.

Fraudulent Conveyance; Grounds; Want of Consideration.—A conveyance by an insolvent debtor to his wife on a simulated consideration is voluntary and void as against existing creditors, whether mala fide or not.—*Tyson v. Cot. O. Co.*, 256.

Same.—Inadequacy of price alone may constitute fraud when so gross as to shock the conscience.—*Ib.* 256.

FRAUDULENT CONVEYANCES.—*Continued.*

Same; Bill; Sufficiency.—A bill by existing creditors alleging that while insolvent respondent conveyed to his wife for a simulated or fictitious consideration, real estate of a value greatly in excess of the consideration expressed, leaving practically no property in respondent out of which complainant's indebtedness could be satisfied and that the wife accepted the conveyance to hinder and defraud complainants, as to whom it was fraudulent and void, and that such a conveyance constituted a preference, and was a general assignment of defendant's property, was open to the demurrer to so much of the bill as charged fraud *mala fide*, but was good as against the other demurrers.—*Ib.* 256.

GRAND JURY.

1. Nature and Functions.

Grand Jury; Nature; Function.—Although a grand jury is a constituent part of the court to which it is attached, it is also a distinct and partly independent body, and its functions are of a judicial nature, although *ex parte*.—*Parsons v. Age H. Pub. Co.*, 439.

Same; Duty as to Public Officer.—It is the duty of a grand jury to investigate any alleged misconduct or incompetency of a county officer, and if they find that he ought to be removed under section 7099, Code 1907, to report the same to the court which report must be entered on the minutes as prescribed by section 7124, Code 1907; if the jury fails to find an impeachable fault or offense, it is neither required nor authorized to report the result of its investigations.—*Ib.* 439.

GUARDIAN AND WARD.

See Infants.

Guardian and Ward; Investment; Liability for Profits.—Where, by a single transaction, a guardian invested the funds of his ward in railroad stocks and bonds, and then sold the bonds for a sum equal to the amount invested, and afterwards sold the stock for \$2,603.00, and fraudulently represented that the profit was only \$100.00, he was liable for the balance of the proceeds of the stock.—*Martinez v. Meyers*, 293.

Guardian and Ward; Subsequent Marriage of Guardian; Effect.—Where a single woman was appointed guardian of a ward, her subsequent marriage did not *ipso facto* terminate her guardianship, though it was necessary that her husband assent to the continuance of the guardianship.—*B'ham C. & I. Co. v. Arnett*, 621.

HOMESTEAD.

Homestead; Vacation of Fraudulent Conveyance.—The right of a debtor to assert a homestead exemption in the land is not affected by the vacation of a conveyance as being in fraud of the debtor's creditors.—*Hamner v. Freeman*, 109.

Homestead; Nature of Estate or Right.—The purpose of the constitutional homestead exemption is the protection of the dwelling place, and while usually a homestead is accompanied by an interest or estate, there is no limitation to any particular estate as to quality, extent or duration.—*Nolen v. East*, 226.

Same; Transfer of; Requisites.—Where a married man was in possession under bond for title, and made an agreement with a third person to pay the balance of the purchase money, such third person to take a deed for the land with an agreement to convey to the purchaser in possession on repayment of the loan, such agree-

HOMESTEAD—Continued.

ment could not operate as a conveyance or assignment of the purchaser's homestead interest, although he may have had only an equitable title to same.—*Ib.* 226.

Same; Action to Protect; Offer to Do Equity.—Where a purchaser under bond for title in possession procures a third person to pay the balance of the purchase price, taking a deed to himself with agreement to convey to the purchaser on repayment of the money advanced, and the purchaser under bond for title offers to pay such person all the money advanced by him for the payment of the purchase price, the offer to do equity is sufficient and entitles the purchaser to a conveyance from such third person.—*Ib.* 226.

Homestead; Mortgage; Execution Before Marriage.—Where an unmarried debtor executed a mortgage upon land, he is not entitled to claim homestead exemptions in the land, notwithstanding the mortgagor married before the foreclosure.—*Pressnall v. Burgess & Co.*, 263.

HOMICIDE.**1. Evidence.****(a) Generally.**

Homicide; Evidence.—In a prosecution for murder, a statement by deceased made while deceased was lying on the floor after having been shot, made in the presence of defendant, accusing defendant of having shot her, was admissible.—*Aaron v. The State*, 1.

Homicide; Evidence; Declarations of Accused.—Declarations of a defendant prior to a homicide expressive of ill will or menace against a decedent, are admissible in evidence against defendant; such evidence differs from confessions and inculpatory statements made after the commission of the offense, and being declarations against interest, are admissible without laying a predicate by first interrogating the party as to whether he had made such declarations.—*Ex parte State*, 4.

Homicide Evidence; Jury Question.—Where the evidence was conflicting as to whether the killing was a continuance of an earlier difficulty, or a separate transaction, that question was properly submitted to the jury, for if the earlier quarrel was a part of the main transaction all the circumstances surrounding it were admissible, and if not, then only the fact of the difficulty was admissible, and not the details.—*German v. The State*, 11.

Homicide; Evidence.—Evidence as to decedent's character was not admissible in the absence of evidence tending to show that defendant was acting in self-defense.—*Watson v. The State*, 53.

Same; Relevant Facts.—In a trial for murder, it was not incompetent to permit a witness to state who composed a certain canning company with which defendant and several of the witnesses seem to have been connected.—*Jones v. The State*, 63.

Same; Acts and Declarations of Accused.—The acts, declarations and demeanor of accused, before or after the offense, are admissible against him, whether part of the *res gestæ* or not, but are not admissible for him unless of the *res gestæ*.—*Ib.* 63.

Homicide; Evidence; Difficulty Between Deceased and Another.—Where the undisputed evidence showed that a difficulty between deceased and another was a contributing, if not the only cause of the fatal encounter between defendant and deceased, evidence of such difficulty was properly admitted.—*Bishop v. The State*, 85.

Same.—Where deceased intervened in an attempt to quiet a disturbance at a picnic, and defendant intervened in behalf of his

HOMICIDE—Continued.

friend B., whom deceased was trying to quiet, and killed deceased, it was competent for a witness to testify as to what B. had in his hand at the time of the killing.—*Ib.* 85.

Same.—Under the circumstances of this case it was not error to permit a witness to testify as to the period intervening from the time he saw deceased with a stick until he saw him dead, as it was part of the *res gestæ*.—*Ib.* 85.

Same; Illustration.—It was not error to permit a witness to testify to and illustrate to the jury the relative positions of the deceased and the other parties to the fatal difficulty, and to state that he saw defendant lying on the ground.—*Ib.* 85.

(b) Dying Declarations.

Same; Dying Declarations.—Whether or not dying declarations are competent, is for the exclusive determination of the trial court, but their credibility and weight is for the jury.—*Gilmer v. The State*, 23.

Same; Fear of Death.—It is not essential to the admission of a dying declaration that deceased in so many words expressed a conviction that she was in extremis, that death was impending, and that she was without hope of life, it being sufficient that surrounding circumstances indicate that at the time the declaration was made, deceased was in extremis, believed death to be imminent, and entertained no hope of life.—*Ib.* 23.

(c) Threats.

Homicide; Evidence; Threats.—Where the evidence in a homicide case is conflicting as to who was the aggressor, a defendant may show previous ill will or threats by deceased.—*Beasley v. The State*, 28.

Same.—The fact that threats made by deceased had been communicated to the accused does not warrant him in commencing the attack until deceased has made some overt act or some hostile demonstration, though a defendant may act upon a slighter demonstration in such an instance than if there had been no threats made.—*Ib.* 28.

Same; Overt Act.—The acts which cause a defendant to really believe himself to be in danger need not be real, but may be appearances only, in view of previous threats made by deceased; but this rule applies only to defensive measures, and does not apply where accused is the aggressor.—*Ib.* 28.

Same; Jury Question.—In view of circumstances leading to the killing, whether threats are a justification is a jury question; consequently where defendant testified that deceased cocked his rifle and started to turn upon him, evidence of previous threats made by deceased became admissible.—*Ib.* 28.

Same; Threats by Deceased.—Where the prosecution was for murder defended on the theory of insanity induced by certain reports, and defendant had proved threats by deceased against him, it is competent for the state to introduce evidence of statements made by defendant indicating that he was on friendly terms with deceased, as tending to show either that he had not heard, or did not believe, that the reports had emanated from deceased.—*Jones v. The State*, 63.

Same; Threats by Deceased.—Until there was evidence tending to show that defendant acted in self-defense in committing the homicide, evidence of threats made by deceased against defendant was not admissible.—*Ib.* 63.

HOMICIDE—Continued.**(d) Insanity.**

Homicide; Evidence; Declarations of Accused; Insanity.—Where the prosecution was for murder, and the plea of insanity was offered, the defendant had the right to prove by his mother his acts and declarations tending to show his insanity, but that was a matter for direct examination.—*Jones v. The State*, 63.

Same.—Where the defendant's theory was that remarks and reports about his wife had come to him so thick and fast shortly before the killing, that they affected his mental condition, and where he had testified as to things he had heard about her, the state, on its inquiry as to his mental responsibility, had the right to go into the facts, and the acts or conduct of defendant tending to refute his claim of insanity, and contradictory of facts claimed to be the cause of his insanity; hence, there was no error in permitting the state to ask him what he had said to third persons as to the hold he had on a certain man with whom his wife's name had been connected, or in permitting evidence of third persons as to previous conversations with defendant as to the rumors about his wife, and her relationship with another man.—*Ib.* 63.

Same; Insanity; Burden of Proof.—Where defendant interposed the statutory plea of not guilty by reason of insanity as a defense to a charge of murder he has the burden of establishing the plea to the reasonable satisfaction of the jury, and a reasonable doubt is not sufficient.—*Ib.* 63.

2. Instructions.**(a) Self Defense.**

Homicide; Instructions; Self-Defense.—A charge asserting that if the situation when accused arrived was such as to impress the mind of a reasonable man that his wife was in danger of losing her life, or of suffering great bodily harm at the hands of decedent, and accused was free from fault in bringing on the difficulty between his wife and the decedent, the jury should acquit, omitted defendant's bona fide belief that his wife was in great danger, as a condition to killing for her protection, and was consequently properly refused.—*Reid v. The State*, 14.

Same; Instructions; Self-Defense.—Charges on self-defense are erroneous if they omit the requirement of a bona fide belief by defendant that he is in danger.—*Beasley v. The State*, 28.

Same; Duty to Retreat.—Where there was evidence that defendant was in peril, it appearing from his evidence that deceased was about to make a murderous attack upon him, he was under no duty to retreat, and a charge otherwise proper was not rendered bad for omitting the duty to retreat.—*Ib.* 28.

Same; Self-Defense; Peril.—A charge that if there was reasonable doubt whether the circumstances were such as to impress the mind of a reasonable man that he was in danger of great bodily harm at the time of the killing, the jury must give him the benefit of the doubt, and acquit the defendant, pretermitted an honest or bona fide belief of the defendant, that he was in peril, and was properly refused.—*Jones v. The State*, 63.

(b) Committed in Resisting Arrest.

Homicide; Instructions; Abstract.—Where a homicide was committed while deceased was attempting to arrest defendant, a charge asserting that where there was no reasonable cause to apprehend any worse treatment than a legal arrest would subject one to, he must

HOMICIDE.—Continued.

submit to an illegal arrest and seek redress at law, was harmless to accused, and did not constitute reversible error, even if abstract.—*Sanders v. The State*, 35.

Same; Manslaughter; Resisting Unlawful Arrest.—The killing to avoid an unlawful arrest, or attempt to arrest, is general manslaughter only, but is not reduced to manslaughter unless committed under the influence of passion induced by the provocation.—*Ib.* 35.

Same; Self-Defense.—One is entitled to resist an unlawful attempt to arrest him, even to the extent of killing the person attempting to make the arrest if necessary to save his own life, or save himself from great bodily harm; but the necessity must be real or reasonably apparent.—*Ib.* 35.

Same; Unlawful Arrest.—In a homicide committed while deceased was attempting to arrest accused as a supposed fugitive from justice, where the evidence showed that deceased was not deputized to arrest defendant, had no process for arrest, and acted on the supposition that accused was a fugitive from justice, defendant was entitled to charges asserting that decedent was not authorized to make the arrest, and the fact that a witness told deceased that he had been informed by a peace officer that such officer was following a woman whose husband had committed a felony, and that the woman had stopped at the house of defendant's relatives, did not constitute probable cause authorizing decedent to attempt the arrest; and that defendant was entitled to reasonably and properly resist an attempt to arrest.—*Ib.* 35.

(c) Generally.

Same; Instructions; Character; Misleading.—Charges asserting that testimony as to defendant's bad character was relevant only as affecting his credibility as a witness, and not as bearing on his guilt, and that evidence of his bad character could not be considered for the purpose of determining his guilt or innocence, were calculated to mislead the jury to the belief that, although they may not have believed the defendant's evidence, that fact should not influence them in passing on his guilt or innocence, and hence, were properly refused.—*Jones v. The State*, 63.

Same; Province of Jury.—A charge asserting that if defendant heard defamatory remarks by deceased against defendant's wife which destroyed defendant's free agency at the time of the offense, he was not guilty by reason of insanity, although he knew it was wrong at the time, and that it was not important whether deceased actually uttered such remarks or not, was properly refused in that it instructs without hypothesis that the effect of hearing such remark was to destroy defendant's free agency.—*Ib.* 63.

Same.—Where the charge was murder defended on the ground of insanity, a charge asserting that if one of defendant's progenitors was afflicted with insanity, by reason of which defendant inherited a diseased mind, and if defendant believed that deceased had made defamatory remarks about defendant's wife, and such belief, combined with any other cause, had entirely deprived him of will power at the time of the offense, defendant was not guilty, although he then knew that the act was wrong, was objectionable as singling out certain parts of the evidence, and was otherwise fully covered by given instructions.—*Ib.* 63.

Same; Insanity.—A charge asserting that insanity was not a stronger term than unsound mind, and did not import a greater degree of mental infirmity, but which did not define unsoundness of

HOMICIDE.—Continued.

mind, or insanity such as would render a person irresponsible, was calculated to mislead the jury into believing that any unsoundness of mind amounted to insanity.—*Ib.* 63.

Same.—Where it appeared that defendant had ample time for cooling after hearing the reports about his wife, a charge asserting that if at the time of the killing he was affected by an illusion that deceased was responsible for the reports prejudicial to the character of his wife, that fact was to be considered in mitigation of the offense charged, pretermitted in hypothesis the fact that such illusion must have so affected him as to render him irresponsible, and was properly refused.—*Ib.* 63.

Same.—A charge asserting that if defendant at the time the homicide was committed was insane on the subject of defamatory remarks by deceased with regard to defendant's wife, and on the subject of a conspiracy by deceased with others to convict defendant of arson, he should be acquitted, provided such insanity overpowered his will, and his power to comprehend the consequences of his act, gave undue prominence to certain parts of the evidence, and was consequently objectionable.—*Ib.* 63.

Same.—Where the offense charged was murder, and the defense insanity, and there was no evidence that deceased had conspired with others to convict defendant of arson, a charge asserting that if defendant was insane on the subject of such conspiracy, he should be acquitted, was abstract.—*Ib.* 63.

Same; Burden of Proof.—A reasonable doubt as to whether defendant was sane or insane at the time of the killing does not require an acquittal, as the burden was on defendant to reasonably satisfy the jury of his insanity under his plea.—*Ib.* 63.

Same; Degree.—In a trial for murder defended on the plea of insanity induced by defamatory reports concerning defendant's wife, where ample cooling time had elapsed between the last report and the killing, a charge that if defendant was informed of the opprobrious language relating to his wife, spoken by deceased on the day of the killing, and he immediately and on the first opportunity shot deceased as the result of heated passion, cooling time had not elapsed, and he was only guilty of murder in the second degree, was properly refused.—*Ib.* 63.

Same.—The refusal of instructions that before the jury could convict, they must weigh the evidence, and that if they believed the defendant insane, their verdict must be guilty by reason of insanity, was not prejudicial to defendant.—*Ib.* 63.

3. Punishment.

Same; Punishment; Jury's Province.—It is the duty of the jury on finding a verdict of guilt of murder in the first degree to determine whether or not the defendant shall be punished capitally.—*Gilmer v. The State*, 23.

4. Defenses.**(a) Drunkenness.**

Homicide; Defenses; Drunkenness.—Unless the intoxication has resulted in the actual insanity of defendant, and for that reason has rendered him mentally incapable of committing a crime, or unless his drunken condition at the time the act was committed was such as to render him incapable of entertaining the specific intent which forms an essential element of the crime of murder, voluntary drunkenness is not a defense to a prosecution for murder.—*Gilmer v. The State*, 23.

HOMICIDE—Continued.

5. Degree.

Same; Degree; Execution of Unlawful Plot.—A killing pursuant to a conspiracy to do a decedent grievous bodily harm renders each conspirator guilty of murder.—*Watson v. The State*, 53.

HUSBAND AND WIFE.

1. Conveyance by Wife.

Husband and Wife; Conveyance by Wife; Joinder.—Under section 2707, Code 1876, a married woman could not convey her property without the husband joining therein, even though the husband was out of the state or had abandoned her, unless she had become a feme sole under the provisions of sections 2723, 2834, Code 1876.—*Jackson L. Co. v. Bass*, 169.

2. Surety for Husband.

Husband and Wife; Wife as Surety; Payment of Husband's Debt.—While a wife may not, under our statute, become surety for the debts of her husband, either directly or indirectly, yet she will not be heard in equity to impeach a fair and free conveyance made by her in absolute discharge of the husband's debt.—*Thornton v. Esco*, 241.

INDICTMENT AND INFORMATION.

1. Validity.

(a) How Raised.

Indictment and Information; Objection to; Mode.—Since the enactment of the jury law, Acts 1909, p. 305, objections to indictments on any ground going to the formation of the grand jury which returned them can be taken in no other way than by plea in abatement, and not then except on the ground that the grand jurors were not drawn by the officers designated by law to draw them.—*Jones v. The State*, 9.

3. Name of Accused and Decedent.

Indictment and Information; Name; Designation of Accused.—An indictment should set forth the christian name of the defendant and not use initials and when initials only are used the indictment is subject to plea in abatement unless it is further alleged in the indictment that the name of the accused was otherwise unknown to the grand jury than as alleged.—*Jones v. The State*, 63.

Same; Designation of Persons Slain.—The use of initials instead of the christian name of the person alleged to have been slain, in an indictment for murder, does not render the indictment subject to demurrer or to plea in abatement, or create such a variance as will authorize the direction of the verdict for defendant.—*Id.* 63.

4. Waiver of Defects.

Same; Defects; Waiver; Plea to Merits.—After a defendant has pleaded to the merits, the indictment is not open to motion to strike, to demurrer, or to plea in abatement.—*Jones v. The State*, 63.

INFANTS.

See Guardian and Ward.

Infants; Sale by Guardian; Collateral Attack.—Where a single woman was appointed guardian of an infant, subsequently married, and after her marriage petitioned for a sale of the real estate belonging to her ward, and the court entered an order of sale, and the sale was made and confirmed, such sale was not subject to collateral attack.—*B'ham C. & I. Co. v. Doe ex dem. Arnett*, 621.

INJUNCTION.

Conjunction; Trespassers; Completed Trespass.—Where the injury to land by cutting and boxing trees for turpentine has already been done, mere recurrent trespasses in operating the business will not authorize the injunction of such trespassing, in the absence of a showing that the respondent or the trespasser is insolvent.—*Dixie Grain Co. v. Quinn*, 208.

Injunction; Trespass; Injury to Realty.—Where injuries to realty are permanent and continuous, tending to destroy the substance of the inheritance, ruin the estate, or permanently impair its future use or enjoyment, equity will interpose by way of injunction, pecuniary compensation being inadequate in such cases.—*Smith v. Morris*, 279.

Same; Conspiracy; Allegation and Proof.—Where the bill was filed against several respondents to enjoin continuous acts of trespass and alleged that they were jointly liable therefor because of an unlawful conspiracy among them to injure and impoverish complainant, but the preponderance of the evidence showed that each act was an independent act, and rebutted the idea that there was a conspiracy, the court properly declined to enjoin.—*Ib.* 279.

Injunction; Subjects; Criminal Ordinance; Property Rights.—While a court of equity will not enjoin criminal or quasi criminal prosecutions under a city ordinance because the ordinance is invalid or unreasonable, though the consequences to the complainant of allowing the prosecution to proceed may be grievous and irreparable, there being an adequate remedy at law, yet the courts will interfere by injunction where such prosecutions will destroy or impair property rights.—*Board Coms. Mobile v. Orr*, 308.

Same.—Where the ordinance would require large expenditures to comply therewith and repeated prosecutions under it had been threatened, and complainant is left to the alternative of going to considerable expense to comply with the ordinance, or submit to the vexation of repeated prosecutions under a void ordinance, equity will enjoin the enforcement of the ordinance until its validity can be determined.—*Ib.* 308.

INSANE PERSON.

See Homicide.

Insane Persons; Contract; Cancellation; Proof.—Where complainant filed his bill to hold respondent as trustee for H., alleged to be mentally non compos, and to satisfy certain mortgages on that ground, and the preponderance of the evidence tended to show that when the transactions occurred, H. was not only attending to his own affairs, but was capable of doing so, and was possessed of the same character of mental ability when the bill was filed, and complainant had to rely on the testimony of H. to establish his allegations of fraud, the complainant did not carry the burden of proof resting on him, and his bill was properly dismissed.—*Harrison v. Carter*, 321.

INSANITY.

As defense to Crime, see Evidence, § 3; Homicide.

INTERPLEADER.

Interpleader; Grounds.—To maintain a bill of interpleader it must be alleged and shown that the subject matter was claimed by all the rival claimants, that all the claims are through a common source; that complainant has no interest in the subject matter, and has incurred no independent liability to any of the claimants.—*Enterprise L. Co. v. First Nat. Bank*, 388.

INTERPLEADER—*Continued.*

Same; Liability of Debtor; Bank Deposit.—Where a fund was subscribed by various individuals and deposited in the bank to be paid to a corporation upon its completion of a railroad in accordance with a contract, and a dispute arose between the company and some of the subscribers as to whether the railroad conformed to the requirements of the contract, the fact that the bank has kept the fund as a general deposit subject to check, and has thereby become indebted to those entitled thereto, does not show that the bank has incurred such a liability to any of the claimants as will preclude its right to interplead.—*Ib.* 388.

Same.—Where a bank asked for interpleader to compel a corporation and several subscribers to a fund to interplead to determine their rights to the fund, the fact that the bank has permitted some of the subscribers to deposit their subscriptions in another bank does not preclude its right to an interpleader, where it acknowledges its liability for the whole amount subscribed.—*Ib.* 388.

Same; Adverse Claim; Identity.—The fact that the corporation claims the entire fund, and the subscribers each claim only a part thereof, does not destroy the right of the bank to have the claimants interplead.—*Ib.* 388.

Same; Separate Claims.—Where the bank filed a bill and asked that the corporation and several individual subscribers to a bonus for the construction of a railroad, which fund was deposited in the bank, be required to interplead as to their claims to the fund, and pays the fund into court, the fact that some of the subscribers to the fund thereafter withdrew their claims does not affect the rights of the bank to have the others interplead.—*Ib.* 388.

INTOXICATING LIQUORS.

1. Regulation.

Intoxicating Liquors; Regulation; Drunkenness.—The Fuller and Carmichael Bills, Acts 1909, p. 8 and p. 63, are in force in those counties in which the manufacture and sale of liquor has not been made lawful under the provisions of the Smith and Parks Bills, Acts 1911, p. 30, and 250, but the Excise Commission of a town without a policeman or marshal was without right to issue a retail liquor license, and the courts not having the power to require the employment of police officers, the sale of liquor in such town was unauthorized, notwithstanding the Excise Commission of the town authorized the issuance of the liquor license and such license was issued; hence, the injunctive process authorized by the Fuller and Carmichael Acts was appropriate to abate sales under such license.—*Allen v. State ex rel. Rowe*, 383.

Same; Power to Issue License; Collateral Attack.—The wholly void act of the Excise Commission of a town in authorizing the issuance of a retail liquor license may be collaterally attacked or wholly ignored.—*Ib.* 383.

JUDGMENT.

See Appeal and Error, § 7.

1. Conclusiveness of.

Judgment; Conclusiveness; Legal and Equitable Issues.—A former judgment in unlawful detainer, the suit having been properly converted into a contest of title, did not conclude issues of a purely equitable nature in such sense as to bar a subsequent equitable action for their litigation.—*Heard & Lee v. Heard*, 230.

JUDGMENT—Continued**2. Amendment.**

Judgment; Amendment; Time.—The motion to correct a judgment and to set it aside must be made within the time during which the trial court has control of the judgment, unless it is a motion for a judgment nunc pro tunc which may be made at any time; in this case, the motion not having been made to correct the judgment and to set it aside within thirty days as required by the Local Statutes, and until after the term of the court had expired, both motions were properly denied.—*McLaughlin v. Beyer*, 427.

3. Res Judicata.

Judgment; Res Judicata; Final Judgment.—Where the minute entry of the judgment showed that the judge intended to enter a final judgment on the merits, as the statute gave him the right to do, but the judgment itself was simply one of dismissal for plaintiff's failure to answer interrogatories, and taxing the cost against plaintiff, there was no final judgment which could be pleaded as res judicata, since to support a plea of res judicata, a judgment must be final and on the merits.—*McLaughlin v. Beyer*, 427.

JURY AND JURORS.

See Grand Jury.

1. Competency.

Jury; Competency; Fixed Opinion.—After a proper explanation of what constitutes a fixed opinion as to the guilt or innocence of a defendant, a juror who answered that he could not say that he had a fixed opinion, that he might not be able to do justice, that he had an opinion, but did not know whether it could be called a fixed opinion, and that he believed he could try the case fairly and impartially on the evidence and render an honest and fair verdict, was competent; so also was one who answered that he had a fixed opinion, but would be governed by the evidence in the case, and the evidence alone, and the law of the case as given him by the court.—*Jones v. The State*, 63.

LANDLORD AND TENANT.

Landlord and Tenant; Injury to Leased Property; Right of Recovry.—Where premises are damaged by overflow while under a lease, the diminution in rental value during the term of the lease is an injury to the tenant, recoverable by him and not by the landlord.—*Sloss-S. S. & I. Co. v. Mitchell*, 576.

LIBEL AND SLANDER.

Libel and Slander; Instructions; Assuming Damages.—In an action for slander for words actionable per se where defendant pleaded the truth of the words as a justification under section 3746, Code 1907, a charge that if defendant had not reasonably satisfied the jury that the plea was true, they might consider the plea as a reiteration of the slander, and as an aggravation of damages, is not objectionable for assuming damages for the plaintiff, as the law presumes damages in such case.—*Webb v. Gray*, 408.

Same; Aggravation of Damages.—Under section 3746, Code 1907, the filing of a plea setting up the truth of the charge is not an aggravation of the damages, unless there is a total failure of proof to sustain the plea, and the circumstances evince malice in reiterating the slander, or a reckless disregard of the consequences of filing such plea.—*Ib.* 408.

LIBEL AND SLANDER—*Continued.*

Same; Evidence; Statement of Third Person.—In an action for slander brought by a woman, the declarations of her alleged paramour made to persons other than defendant as to his conduct with plaintiff, or as to his conduct generally, and as to his reasons for leaving the community, are hearsay and inadmissible, even under the statute allowing the circumstances under which the words were spoken to be proven in mitigation of damages.—*Id.* 408.

Same; Letters of Plaintiff.—In an action for slander letters purporting to be from plaintiff to a man, which were only connected with her by the hearsay statements of the recipient, or by the fact that they were written in a lady's hand, purporting to be signed by plaintiff's first name and handed to the recipient by her nephew, were not admissible as admissions of the truth of the acts charged, but where they were shown to defendant, they are admissible in mitigation as tending to show a reasonable belief by defendant of the truth of the statements attributed to him.—*Id.* 408.

Same.—The testimony of another witness corroborative of defendant, that such letters were shown to defendant by the recipient, and that they were delivered to recipient by the nephew of plaintiff, are admissible, but it was not error to exclude evidence as to what the witness saw the recipient do when not in the presence of defendant.—*Id.* 408.

Same; Motive of Defendant.—Evidence that defendant purchased the business of the man with whom he stated that plaintiff had had improper relations, was admissible to show that he had a motive in getting rid of such person, and started the report maliciously.—*Id.* 408.

Same; Truth; Justification.—In an action for slander charging plaintiff with improper relations, evidence of the existence of rumors and reports concerning her was not admissible to establish the truth of the statements made by defendant.—*Id.* 408.

Same; Instructions; Effect of Evidence.—Where there was evidence of common report of improper relations on plaintiff's part, and that her paramour had fled because of such reports, it was not error to refuse a charge that the jury might consider the fact of such flight in determining the truth of the rumors.—*Id.* 408.

Same.—A charge asserting that if plaintiff's paramour was the sole source of the rumors concerning plaintiff, the jury could not find a verdict for her, was manifestly erroneous.—*Id.* 408.

Same; Reputation of Defendant.—It was not error to refuse to charge that in a libel suit the defendant is not permitted to offer evidence of his good reputation, and that he is presumed to be of good reputation until the contrary appears, which presumption, when considered in connection with the other evidence may raise a reasonable doubt as to the truth of the charge against the defendant.—*Id.* 408.

Same; Punitive Damages.—In an action for damages for speaking words slanderous per se, it is for the jury to determine whether plaintiff is entitled to punitive damages or not.—*Id.* 408.

Same; Complaint; Amendment.—Under section 5369, it was permissible for plaintiff to amend her complaint for slander of plaintiff, "an unmarried woman," by adding counts which charged defendant with speaking the same words concerning plaintiff "then, and ever since, an unmarried woman."—*Id.* 408.

Libel and Slander; of Title; Pleading.—In an action of slander of title the rules of pleading and evidence are enforced with peculiar strictness.—*Ebersole v. Fields*, 421.

LIBEL AND SLANDER—Continued.

Same; Right of Action.—Special damages is the gist of the action of slander of title, and false and malicious statements disparaging title are actionable, when followed by special damages to the owner as a natural and proximate result of the statement.—*Ib.* 421.

Same; Nature of the Special Damages.—Mental distress is not part of the special damages necessary to support an action of slander of title; such special damage must be a pecuniary loss which is the proximate result of the slander.—*Ib.* 421.

Same; Pleading; Sufficiency.—Mere general allegations of loss are not sufficient to support an action of slander of title, an averment of special damages being necessary; hence, the complainant averring that defendant falsely slandered plaintiff's title, followed by allegations of mental distress and mere general allegations of monetary loss is not sufficient.—*Ib.* 421.

Same; Statute.—Section 2459, Code 1907, is merely declarative of the common law, and does not avoid the necessity of alleging special pecuniary damages.—*Ib.* 421.

Libel and Slander; Privileged Communication; Judicial Proceedings.—A fair and accurate newspaper report of judicial proceedings, published in good faith and not to injure the persons concerned, is privileged, although it contains matter that is false, defamatory and injurious.—*Parsons v. Age H. Publ. Co.*, 439.

Same.—Newspapers have no particular privilege with reference to the publication of libel, but are liable as ordinary persons.—*Ib.* 439.

Same.—While newspapers may discuss and criticize without liability the conduct and motives of public officers, if their comments are fair and reasonable, they are liable for false aspersions on the character of such officer, and can justify only by proving the truth of the statements.—*Ib.* 439.

Same.—Publication of pleading or other preliminary papers in an action or proceeding, to which the attention of no judicial officer has been called, and on which no judicial action has been invoked, is not within the privilege accorded at common law to the publication of judicial proceedings.—*Ib.* 439.

Same.—The report of a grand jury concerning the alleged official misconduct of a constable, was not a judicial proceeding within the rule of qualified privileges in the law of libel at common law, where such report was not found to establish an impeachable offense.—*Ib.* 439.

Same.—A fair statement in a newspaper of the contents of the grand jury reports charging an official with certain improper acts not sufficient to constitute an impeachable offense, was qualifiedly privileged, if published in good faith, without malice, and in the belief that the matter was true, although the report was beyond the authority of the grand jury.—*Ib.* 439.

Same.—Libelous imputations in a grand jury report on private citizens or public officers, not touching their fitness for office, or their fidelity to the public service, or the propriety of their official acts, are not properly matters of public interest, and are not privileged.—*Ib.* 439.

Same.—Where a grand jury's report contains an attack on a public officer, but has not been duly published by the grand jury itself in open court, privilege does not attach to a publication thereof by a newspaper.—*Ib.* 439.

Same.—The publication of matters which are forbidden by law or by order of the court as being improper for publication, is not privileged when published by third persons.—*Ib.* 439.

LIBEL AND SLANDER—*Continued.*

Same.—Where matter is published from a grand jury's report after filing, without comment or criticism, it must be deemed as a matter of law, fair and accurate, in an action for libel.—*Id.* 439.

Same.—The rule that fair comment and criticism on public officers is privileged, is limited to comment or criticism on admitted or proven facts or conduct, and does not extend to the expression of adverse criticism on new facts.—*Id.* 439.

Same.—Whether comment or criticism on the conduct of a public officer was privileged, is a question of law, but conceding the occasion, whether the comment or criticism was fair, was a question for the jury.—*Id.* 439.

Same.—A statement in a newspaper published with reference to a public officer that he "preys upon the poor and unfortunate" was libelous per se when wholly without foundation so far as shown.—*Id.* 439.

Same; Mitigation of Damages.—Under the general issue in an action for damages, defendant may prove the truth or partial truth of any of the alleged defamatory matter in mitigation of damages.—*Id.* 439.

Same; Evidence.—Where a newspaper charged a constable with proceeding improperly under a writ, the court papers in the action in which the writ was issued were admissible in an action for libel, to show the fact and character of the proceeding in connection with which plaintiff was charged with official impropriety.—*Id.* 439.

Same.—A letter written by plaintiff to defendant concerning the publications complained of, and giving plaintiff's version of the transaction, was legal evidence both for and against him when offered by defendant.—*Id.* 439.

Libel and Slander; Privileged Communication; Statement by Officer of a Corporation.—Where defendant as president of a corporation, while engaged in the corporation's business charged plaintiff, who was the corporation's overseer, with the larceny of certain cotton and cotton seed belonging to the corporation, the statement is none the less privileged because it concerned the business of the corporation, and not that of defendant individually.—*Phillips v. Bradshaw*, 541.

Same; Pleading; Denial of Malice.—Where the action was for slander in charging theft against the overseer of a plantation belonging to a corporation, against the president of the corporation individually, and defendant as such president pleaded privilege and alleged that the statement was made without malice, and the words spoken in good faith, the plea was not defective because it fails to explain the fact that the communication was made in the presence of "divers others" by setting forth every fact on which defendant relied to show a reasonable occasion.—*Id.* 541.

LIENS.

1. Equitable.

Lien; Equitable; Definition.—The term "lien" is used to denote a charge or encumbrance on a thing, where there is neither a *jus in re* nor *jus in rem*, nor possession of the thing.—*Steagall v. F. Co. v. Bethune M. Co.*, 250.

Sales; Equitable Lien; Proceeds of Sale by Merchants.—The contract examined and the facts stated, and it is held that the seller could not claim an equitable lien on the proceeds of the fertilizer sold by virtue of the contract of sale, as no lien existed on the fertilizer itself.—*Id.* 250.

LIFE ESTATE.

Life Estate; Conveyance by Life Tenant.—A deed by a tenant in common for life purporting to convey an estate in fee will be given effect as a conveyance of the grantor's interest in the estate.—*Kidd v. Borum*, 144.

Same; Right of Remaindermen.—Where a tenant in common for life conveyed the premises by deed purporting to convey a fee, and the grantee entered into possession claiming exclusive title, and he and those claiming under him continued in the actual and exclusive possession for thirty years, the tenants in common in remainder were not barred by limitations during the lifetime of the tenant in common for life.—*Ib.* 144.

LIMITATION OF ACTIONS.

Limitation of Action; Infancy; Dereliction of Next Friend.—Where an infant brings an action by next friend and the action is dismissed for failure to answer interrogatories, the infant is not barred by the statute of limitations of one year on account of such dereliction on the part of such next friend, as section 4848, Code 1907, allows an infant three years after reaching majority within which to bring an action.—*McLaughlin v. Beyer*, 427.

LOGS AND LOGGING.

Logs and Logging; Conveyance of Standing Timber; Limitations.—The deed considered, and it is held to convey an absolute title to the timber, and that the limitations therein contained only applied to the grantee's rights under the deed to enter the land and construct and operate tram roads to remove that or other timber.—*Vizard v. Robinson*, 349.

LOST INSTRUMENTS.

Lost Instrument; Mortgages; Foreclosure; Proof Required.—Before equity will foreclose a lost mortgage, its execution and former existence must be as clearly established as though the bill had been primarily filed to establish it as a lost instrument.—*U. B. Church v. Roper*, 297.

Same; Evidence.—The evidence considered and held insufficient to show the execution of the mortgage sought to be foreclosed.—*Ib.* 297.

MANDAMUS.

Mandamus; Compelling Performance of Duty.—Mandamus does not lie to compel municipal officers having discretionary power to exercise their power in a particular way, but does lie to compel an imperative ministerial duty.—*State ex rel Bibb v. Warrior*, 642.

MASTER AND SERVANT.

1. Liability for Assault.

Master and Servant; Assault by Servant; Line of Duty; Evidence.—Evidence that plaintiff had been in the employment of defendant corporation and had been discharging his duties under the personal direction and control of C, and that C discharged the plaintiff because of a difference between them about plaintiff's manner of doing his work, and assaulted plaintiff while he was leaving but was still in defendant's place of business, authorizes a finding that the assault was committed in the course of C's employment, and within the line of duty assigned him so as to make the defendant liable, where there was an absence of evidence that the assault grew out of anything other than such differences, and the fact and manner of dismissal.—*Jebbes-Co. Conf. Co. v. Booze*, 456.

MASTER AND SERVANT—Continued.

Same; Complaint.—A complaint charging that C, an agent and servant of defendant corporation, while engaged in or about defendant's business and acting within the line and scope of his authority as such agent or servant, wantonly and violently assaulted and beat plaintiff with a stick, causing injuries, is sufficient.—*Id.* 456.

Same; Instructions.—Where the defense was that the assault was by another servant of defendant who had no duties to perform at the place of the assault, and all the testimony showed that C was, at the time of the assault, an agent of defendant, in charge of that part of the premises where plaintiff's duties were performed, and in personal command of plaintiff while he remained in defendant's service, and where the assault was committed just after he had discharged plaintiff, a charge asserting that the verdict must be for defendant, if the jury believe from all the evidence that plaintiff was assaulted "as alleged in the complaint," but that it was committed by someone not an agent or employee of defendant, provided they believed defendant did not authorize or instigate the assault, needed some construction to prevent misleading tendencies justifying its refusal.—*Id.* 456.

2. Injury to Servant.**(a) Proof and Variance.**

Master and Servant; Injury to Servant; Proof; Variance.—Where the complaint alleged that plaintiff was engaged in and about the discharge of his said duties in said mine, as mule driver, when injured by the cars running down the incline, and the proof showed that plaintiff was standing by the side of a slope, when five loaded cars passed by the slope, leaving an entry switch latch open, and that one of the men on the cars called out to plaintiff to shut the latch for him, which plaintiff was stooping down to do, when the cars broke loose and came down the incline striking him, there was a fatal variance, as the evidence showed that plaintiff was not acting within the line and scope of his duty as mule boy or driver when injured.—*Marie v. Sloss-S. S. & I. Co.*, 548.

(b) Defective Appliances.

Master and Servant; Injury to Servant; Defective Tools.—Where the action was under subdivision 1, section 3910, Code 1907, by a servant for injuries alleged to have been occasioned by a defective tool furnished him to work with, plaintiff could not recover by merely showing that the tool was defective, but must go further and show affirmatively that the defect complained of arose from, or had not been discovered or remedied by the reason of the negligence of the master, or of some one in authority in its behalf.—*Owen v. A. G. S. R. R. Co.*, 552.

Same.—Where the tool by which plaintiff was injured was not originally defective, and the defect that existed causing the injuries was latent and discoverable only by practical and continued use by an operator, defendant was not negligent for a failure to discover such defect before delivering the tool to plaintiff for use.—*Id.* 552.

Same; Statute.—Subdivision 1, section 3910, Code 1907, does not change the nature of the duty owed by masters to their servants to use ordinary care and diligence to furnish safe and suitable instrumentalities and appliances and ways, etc., so as not to expose servants to unnecessary perils, exercising such care and diligence as men of ordinary prudence would exercise under like circumstances.—*Id.* 552.

MASTER AND SERVANT—*Continued.*

Same; Defective Machinery.—Where a motor, which a witness found for his own use in defendant's shop the next morning after plaintiff had been injured while using a similar motor, was not shown to be the same motor that plaintiff was using when injured, such witness was not entitled to testify as to the defective condition of the motor he found.—*Owen v. A. G. S. R. R. Co.*, 552.

Same.—Where a plaintiff was injured by a defective motor drill, questions to him as to whether his boss did not know that those sockets had burrs on them, etc., not being confined to the socket used by plaintiff at the time of his injury, were properly excluded.—*Id.* 552.

Same.—Where a plaintiff was injured by a defective motor drill and claimed that his fellow servant was incompetent, and that the injury resulted on account of such incompetence, a question as to what the fellow servant's duty was about cutting off air when directed, was immaterial, as it was asked prior to the introduction of any evidence that such fellow servant was incompetent.—*Id.* 552.

(c) Superintendence.

Same; Superintendence.—In the absence of proof that it was the part of W.'s duty to procure the machines originally, or inspect them afterwards, or that he knew that the particular motor was defective, or by any practicable inspection could have discovered the defect, evidence that he was plaintiff's boss, and had charge of tools, including compressed air or motor drills, was not sufficient to show that he was engaged in superintendence in such sense as to render the master liable in furnishing the servant with a defective motor by which he was injured.—*Owen A. G. S. R. R. Co.*, 552.

Same; Evidence.—The evidence examined and held insufficient to show that the injuries to the servant were caused by the negligence of the superintendent of the master.—*Twinn T. L. Co. v. Day*, 565.

Master and Servant; Complaint; Negligence of Superintendent.—A complaint based on subdivision 2, section 3910, Code 1907, which alleges the relation between the parties, and that a named superintendent of the employer negligently directed a truck loaded for one kiln to be placed in another, whereby plaintiff was injured is not so indefinite as to be subject to demurrer even though it did not appear therefrom how the order operated to injure the plaintiff.—*Twinn T. L. Co. v. Day*, 565.

(d) Incompetent Fellow Servants.

Same; Incompetent Fellow Servant.—Where the servant claimed that his injuries resulted from the negligence of an incompetent fellow servant, the burden was on plaintiff to show that the injury was the result of the act or omission of a fellow servant, that he was incompetent to perform the duty he was required to perform, and that such incompetency was known to the master or that the master could have acquired knowledge by the exercise of due diligence prior to the accident.—*Owen v. A. G. S. R. R. Co.*, 552.

Same.—The evidence examined and held not sufficient to show that defendant's servant whose alleged negligence caused plaintiff's injury, was incompetent to perform the work required of him, or that, if incompetent, that defendant had knowledge or opportunity for knowing thereof.—*Id.* 552.

MASTER AND SERVANT—*Continued.*

3. Independent Contractor.

Master and Servant; Independent Contractor; Liability; Danger.—The work of calcimining interior walls, where they can be reached with an ordinary stepladder, is not so inherently dangerous as to render the owner liable for the negligence of a servant of an independent contractor doing the work in tipping a bucket of calcimine from an insecurely fastened stepladder, causing the calcimine to break through a window and fall, with glass, on a passerby on the outside; the expression "danger" means only some contingent harm which might be reasonably foreseen and guarded against, and not mere possibility of accident.—*Drennen Co. v. Jordan*, 570.

Same; Liability to Master.—Where the work being done by an independent contractor was the calcimining of interior walls, which could be reached with an ordinary stepladder, the building, because it contained opened and unguarded windows, was not so dangerous as to render the owner liable for an accident caused by the carelessness of a servant of the independent contractor doing the work which resulted in the calcimine going through the window on to a passerby below.—*Ib.* 570.

MORTGAGES.

1. Recordation and Notice.

Mortgages; Record; Presumption of Notice.—In an action against the grantees of a decedent to set aside the transfer of property, and apply it to the payment of a claim arising out of a sale by decedent to the complainant of a mule which complainants were held to have converted at the suit of the mortgagee under a mortgage given by decedent, and recorded in another county, the presumption will be indulged that the record afforded complainants constructive notice of the mortgage, where the bill fails to aver facts showing the contrary, notwithstanding an averment of want of actual knowledge of the mortgage; and also that the location or removal of the animal after the mortgage was recorded did not deprive the recordation of its effect as constructive notice.—*Gallland v. Williams*, 173.

Same; Constructive Notice.—Where the adjudication of a conversion by complainant of the property at the suit of the mortgagee is set forth in the bill seeking to set aside the transfer by a decedent of his property to the mortgagee and apply it to the payment of a claim arising out of the sale to complainant by decedent of the property in question, would indicate notice of the mortgage, though recorded in another county, constructive notice will be presumed, since a judgment for conversion could not have been rendered if the complainants had been legally without notice of the mortgage when they purchased the property.—*Ib.* 173.

Mortgages; Recording; Notice of Power of Sale.—The recording of a mortgage containing a power of sale operates as notice to the world of such power, and of any title acquired by a purchaser thereunder, and hence, would deprive subsequent judgment creditors and purchasers of the protection of the registration statute, though they had no actual knowledge of the foreclosure and sale under the power, although the foreclosure deed was not recorded prior to the rendition of their judgment.—*Dixie Grain Co. v. Quinn*, 208.

2. Foreclosure.

Same; Foreclosure; Property Conveyed.—One who received a sheriff's deed to standing timber merely cannot convey the right to operate a turpentine orchard in connection with such timber, the purchaser's right to convey including only the right to remove it.—*Dixie Grain Co. v. Quinn*, 208.

MORTGAGES—Continued.**3. Redemption.**

Same; Redemption; Duly Recorded.—In a suit to redeem land from a mortgage foreclosure sale, an allegation that the mortgage was duly recorded, without alleging the date, was sufficient, since the word, "duly" as used in connection with "recorded" meant that it was recorded within the time allowed by law.—*Dixie Grain Co. v. Quinn*, 208.

Same; Equity of Redemption.—The mortgagor's equity of redemption was not extinguished by the payment by his equitable mortgagees, holding a mortgage on rights under a conditional sale of land to the mortgagor, of the amount owed by the mortgagor to his vendors to entitled him to the land.—*Heard & Lee v. Heard*, 230.

Same; Redemption; Laches.—Where a bill was filed in 1903, by the mortgagor against the mortgagees for equitable relief on the ground of fraud, and such bill was dismissed in 1905, a bill for redemption filed in 1908, was not barred by laches.—*Ib.* 230.

Mortgages; Foreclosure; Redemption; Bill.—Where the bill alleged the execution of certain mortgages which the mortgagees were proceeding to foreclose, the bill possessed equity as a bill to redeem where it charged that one of the mortgages was intended as additional security for the sum furnished by the mortgagee to effect a transfer of the other mortgage, all of which were for the same debt, and that the mortgagees claimed a sum as secured by the mortgage largely in excess of that which was justly due, and were endeavoring to force payment of debts not embraced in or secured by the mortgage, that the property was many times more valuable than the secured indebtedness, that the secured indebtedness was much less than the amount claimed by the mortgagee, and that the mortgagor was ready and willing to pay whatever was justly due.—*Presnall v. Burgess & Co.*, 263.

Same.—Where the bill to redeem did not show that the entire amount secured by the mortgage had been paid or tendered, the pendency of the suit to redeem did not suspend the power of sale vested in the mortgagee by the mortgage, his successors or assigns, although the bill offers to do equity by paying the ascertained amount secured by the mortgage.—*Ib.* 263.

4. Interests Subject to.

Mortgages; Interests Subject to; Conditional Sales.—The instrument executed between the mortgage company and Heard examined and held to be a contract of conditional sale of the property therein mentioned, and hence, Heard acquired such an interest therein as was subject to mortgage.—*Heard & Lee v. Heard*, 230.

Same; Contract.—The endorsement on a conditional contract of sale examined, and held to constitute in equity a mortgage between complainants and defendant of such interest as complainant had in the property therein mentioned.—*Ib.* 230.

5. Indebtedness Acknowledged.

Same; Indebtedness; Adjustment; Vacation.—Where prior to the foreclosure the mortgagor in writing admitted that he was indebted in the sum of \$1,750.28, with interest from January 21, 1908, on a certain mortgage and in consideration of an extension to October 1, following, he promised to take up the mortgage on that date in full, such an admission constituted an adjustment of the account, and would not be set aside or reopened except for fraud or mistake.—*Presnall v. Burgess & Co.*, 263.

MORTGAGES—Continued.

6. Powers and Sale.

Same; Power of Sale.—The power of sale in a mortgage is a power coupled with an interest which cannot be suspended or revoked at the will of the mortgagor without the consent of the person secured.—*Presnall v. Burgess & Co.*, 263.

Same; Sale.—Where the amount secured by certain mortgages had not been fully satisfied or full tender made, a proper sale under the power passed the unqualified title, though made after the filing of the bill to redeem.—*Ib.* 263.

7. Deeds as.

Mortgages; Deed as; Debt; Necessity.—The test in determining whether an instrument is a mortgage, or a sale with the privilege of repurchasing, is the existence or non-existence of a debt to be secured, as the idea of a mortgage without a debt to be secured by it is a legal myth in our system of jurisprudence.—*Bell v. Shivers*, 303.

Mortgages; Deed as; Evidence.—The rule that to authorize the court to declare a deed absolute on its face to be a mortgage, it is not sufficient to raise merely a doubt whether the instrument speaks the intention of the parties, but the court must be satisfied by a clear preponderance of the evidence that a mortgage was intended, is without application in cases where the writings express a conditional sale, or where it is admitted that there was a contemporaneous agreement different from that expressed in the instrument.—*Nelson v. Wadsworth*, 361.

Same.—The evidence considered and held sufficient to show that it was the intention of the parties that the instrument should operate as a mortgage.—*Ib.* 361.

Same; Transfer of a Grantee; Liability of Grantor.—The grantee who took land as security for a debt under a deed absolute on its face and conveyed the same to purchasers for value without notice, is bound to compensate the owner upon the deed being declared a mortgage and redemption.—*Ib.* 361.

MUNICIPAL CORPORATION.

1. Streets.

(a) Use of

Municipal Corporation; Streets; Use of.—The right of the public to use the streets for travel is superior to that of an abutting owner, or any other person to use it for any other purpose, such as standing vehicles near the curbing in loading or unloading goods.—*B. R. L. & P. Co. v. Smyer*, 121.

Same.—The rights of the public to pass over the street extends to every part of it, and applies to the use of new classes of vehicles as they come into use, as well as to those existing when the street was opened, except any new use which tends to destroy the street as a means of travel common to all.—*Ib.* 121.

(b) Obstruction.

Same; Obstruction; Nuisance.—Any unauthorized, permanent obstruction of a street preventing its use by the public is a nuisance which a court of equity will abate in a proper suit.—*B'ham Ry. L. & P. Co. v. Smyer*, 121.

2. Bond Elections.

Municipal Corporations; Bond Election; Ballots; Constitutional Provisions.—The courts will recognize the right to impose by con-

MUNICIPAL CORPORATIONS.—*Continued.*

stitutional provisions the form and contents of ballots to be used in an election to determine whether or not the municipality shall issue bonds.—*Realty Inv. Co. v. City of Mobile*, 184.

Municipal Corporation; Bond Election; Form of Ballot.—Under the provisions of section 222, Constitution 1901, the ballots here used substantially complied with the constitutional form therein prescribed, and were sufficient, as a substantial compliance was all that was required.—*Ib.* 184.

3. Ordinances.

Same; Ordinances; Reasonableness.—A wide discretion is conceded to the legislative branch of city governments in the adoption of ordinances to promote public health and comfort, but in the exercise of the court's ancient jurisdiction, such ordinances will be declared void if they are unreasonable or inconsistent with the general purposes of the law of the land, especially when referring to the liberty of the citizen and his right of private property.—*Board Coms. Mobile v. Orr*, 308.

Same.—An ordinance is invalid for inequality and unreasonableness which provided that all stables within the city's jurisdiction where two or more horses, mules or cows were kept, should be connected with the water mains and sanitary sewers of the city, and that the stalls, pens, etc., should be paved with cement or brick, according to particular specifications, and imposing fines and penalties for failure to do so after notice, where the city's jurisdiction extended a considerable distance beyond its sewer system.—*Ib.* 308.

Same; Public Health; Regulation.—While the regulation of the keeping of animals within the limits of a city is a proper subject for police regulation to conserve the public health, yet where the city permits the disadvantages arising from the collection of animals in groups or numbers, there is no reasonable grounds for classification in the regulation of animal pens within the city between the keepers of single animals and those who keep two or more.—*Ib.* 308.

4. Officers and Incidents.

Municipal Corporations; Officers; Statutes.—Acts 1898-9, p. 724, sec. 4, is repealed by section 1067, Code 1907, which section makes it discretionary with the council whether it will create the office of marshal in towns having a population of less than 6,000.—*State ex rel. Bibb v. Warrior*, 642.

Same; Construction.—Sec. 1048, Code 1907, means that a municipality may not continue an office, although authorized by its charter, where the office is not authorized by the Municipal Code Act, or by law; and does not mean that all officers merely authorized by the Municipal Code Act must, of necessity, be continued because required by the original charter of the town.—*Ib.* 642.

Municipal Corporations; Officers; Kind.—Mere municipal officers are not state officers within the meaning of the Constitution.—*State ex rel. Wilkinson v. Lane*, 646.

Same.—Under Acts 1911, p. 204, the Board of Commissioners there created is a municipal board only, and the members thereof are mere municipal officers, and the fact that the Governor appoints the first incumbent, does not affect the character of the officers as municipal officers.—*Ib.* 646.

Same; Judicial Officers.—Acts 1911, p. 204, creating the Commission form of government and clothing one of the commissioners with powers of a judicial nature, does not render such Commissioner

MUNICIPAL CORPORATIONS.—Continued.

other than a municipal officer, and the fact that the Act falls to provide appeals from his decision, and that he may exercise legislative and executive functions as well, does not destroy the character of his office as a municipal, judicial one.—*Ib.* 646.

Same.—The provisions of section 150, Constitution 1901, do not prohibit the judicial officers named from holding judicial offices which have attached to them duties other than judicial, but only from holding offices not judicial; hence, it does not prohibit a circuit judge from holding during the term for which he was elected the office of commissioner of a city, under appointment, operating under Acts 1911, p. 204, and exercising judicial functions of the city as its judicial officer.—*Ib.* 646.

Same; Legislative Control.—The legislature has full power to repeal, alter or amend the charter of a municipality, and to create a new municipality.—*Ib.* 646.

Same; Commission Form; Statutes.—The mere fact that the Governor of the State is to appoint the first three members of the Board of Commissioners of a city operating under the commission form of government provided in Acts 1911, p. 204, does not render the act unconstitutional.—*Ib.* 646.

Same; Oath.—The oath prescribed by Constitution, section 279, is required only from state, and not from municipal officers.—*Ib.* 646.

NAVIGATION.

Navigable Waters; Bridges; Authorizing Construction and Maintenance.—It is within the power of the states to authorize the construction of bridges across navigable streams within their limits, until Congress has taken cognizance thereof or acted thereon.—*Mauldin v. C. of Ga. Ry. Co.*, 591.

Same; Obstructions; Actions; Pleading.—A complaint which alleges the construction of a bridge across a navigable stream by defendant, the piers or substructure of which obstructed the passageway of the stream, except for the narrow spaces between such piers, that driftwood had collected against the substructure obstructing the use of the river for the purpose of floatage of logs and timber, and causing plaintiff special damages, but which fails to allege whether it was built, since the passage of the Act of Congress of March 3, 1889, fails to show the maintenance of the bridge was a public nuisance.—*Ib.* 591.

NEGLIGENCE.

In particular actions, see that title.

1. Violating Ordinance.

Negligence; Ordinance; Construction.—A municipal ordinance providing that builders, architects or owners of premises, which are being improved above one story, shall erect a temporary shed to protect the passershy on the sidewalk, does not require an owner of a building having interior walls decorated to erect such shed, since the courts strive to construe an ordinance so as to give a reasonable effect to the objects and purposes intended.—*Drennen Co. v. Jordan*, 570.

NEW TRIAL.**1. Criminal.**

New Trial; Criminal Case; Discretion.—In criminal cases motions for new trials because of newly discovered evidence are addressed to the sound discretion of the trial court, and the court's action thereon is not revisable on appeal.—*Aaron v. State*, 1.

OFFICERS.

1. Tenure.

Officers; Tenure; Authority; How Raised.—The title to town offices must be tested by a direct proceeding, and cannot be raised or determined in a collateral proceeding for writ of injunction, and a seizure against the sale of intoxicating liquors by one to whom excise officers had issued a void liquor license.—*Allen v. State, ex rel. Rowe*, 383.

OVERRULED OR QUALIFIED CASES.

Carlisle v. Ala. G. S. R. R. Co., 166 Ala. 591—by *Ex parte So. Ry. Co.*, 486.

L. & N. R. Co. v. Holland, 164 Ala. 73—by *Ex parte So. Ry. Co.*, 486.

Hereford v. Combs, 126 Ala. 369—by *Webb v. Gray*, 408.

Pool v. Devers, 30 Ala. 672—by *Webb v. Gray*, 408.

So. Ry. Co. v. Smith, 163 Ala. 174—by *Ex parte So. Ry. Co.*, 486.

B. R. L. & P. Co. v. Moore, 148 Ala. 128—by *B. R. L. & P. Co. v. Goldstein*, 517.

PARTITION.

Partition; Rights of Surviving Wife and Children; Sale of Homestead.—Under the provisions of section 4196, Code 1907, a court of equity could order a sale of lands, a reinvestment of the part of the proceeds belonging to the widow and minors, and a payment of the balance to the adult children, in a suit in which the widow and minor children all joined as complainants if convinced that it was to the interest of the minors for the sale to be had; especially in view of the further provision giving the chancery court power of sale for reinvestment with the consent of the widow in writing, this being intended to place the same limitations upon the power of courts to order a sale where the homestead vests absolutely as where by reason of solvency of the homestead did not vest absolutely.—*Clements v. Faulk & Co.*, 219.

Same; Who May Sue.—A party having the present use and enjoyment of lands, and entitled to share in the proceeds of a sale as a remainderman may file a bill to sell such lands, if they cannot be equitably partitioned, although some of the parties interested therein may be remaindermen only.—*Ib.* 219.

Partition; Estates; Life Estate.—Where seven persons own each an undivided one-seventh interest in land, subject to an undivided one-sixth and one-fourth interest for life vested in two other parties, all the parties are tenants in common, and the fact that two of them held only for life would not defeat a partition of the land.—*Hollis v. Watkins*, 248.

Partition; Disputed Title; Jurisdiction of Equity.—In an action for partition, equity has jurisdiction to determine the controverted question of title raised by the answer (section 5232, Code 1907).—*Combs v. Greene*, 325.

PERPETUITIES.

Perpetuities; Restraint of Alienation for Term of Years.—The will considered, and it is held that the purpose of the testator to vest in each of his children an interest of one-sixth of his estate directed to be sold, subject to "the previous life estates limited herein," the will devising certain land to each of three sons for their several lives respectively, and on their several deaths within twenty-five years after his death to their children, or, if there were no children, to the

PERPETUITIES—Continued.

surviving donees until the expiration of twenty-five years, was void, since, notwithstanding the recital that his purpose was to vest an interest in the remainder subject to the previous life estates, the will created no previous life estates, but devised to the sons and their children a term of twenty-five years which could not be done under the provisions of section 1030, Code 1896.—*Ashurst v. Ashurst*, 401.

PLEADING.

In particular actions, see that title.

1. Separate Causes Joined.

Pleading; Separate Causes of Action.—A plaintiff may join two or more causes of action in the same complaint, but not in the same count.—*B. R. L. & P. Co. v. Nicholas*, 491.

Same.—A plaintiff cannot join in a single count in an uncertain manner two or more distinct causes of action in order to hit some possible cause of action that he may be able to prove at the trial, as a defendant has the right to be informed of the particular cause of action for which he is sought to be held liable.—*Ib.* 491.

2. Alternative Averments.

Same; Form; Alternative Allegations.—Alternative allegations are allowable where each alternative of itself states a good cause of action or ground of defense, but this rule does not allow the statement in pleading of material allegations in the alternative which are inconsistent with each other.—*B. R. L. & P. Co. v. Nicholas*, 491.

Same; Alternative and Disjunctive.—Counts of a complainant against a street railway company for personal injury which leave it uncertain whether the plaintiff was a passenger, or merely entitled to the care and protection as a passenger; whether a trespasser or licensee; whether at the station as a passenger, or only near it with the intention of becoming a passenger; whether on the track when injured or only near the track, and if only near, how near; whether near enough to the track to be struck by a car, or only near enough to be frightened and caused to fall, was subject to special demurrer because of alternative and disjunctive averments.—*Ib.* 491.

Same.—Material allegations in a count alleged in the alternative or disjunctive, some of which do not state a good cause of action, rendered the count bad under the rule that pleading in the alternative is no stronger than its weakest alternative, and if one of the alternatives fails to state a cause of action, the pleading fails.—*Ib.* 491.

Same; Persons Near Track.—A count for personal injuries by wanton negligence, if it alleged that plaintiff was on a public street or thoroughfare, was rendered bad, by the additional averment "or other crossing," since it was possible, under such allegation, that plaintiff was on a way or place not used by the public, and so was a trespasser.—*Ib.* 491.

Same.—The use of the word "near" relating to dangerous agencies, if accompanied by the qualifying word "negligently" or "dangerously," with averments of knowledge of the danger on account of the proximity, is good pleading; but when used alone with "at, on, or under," a dangerous agency, it is bad as an alternative, for to say that a person is on a railroad crossing implies a dangerous place, but that he is at or near such crossing does not necessarily imply a dangerous place, since he may be a distance of from one to fifty feet.—*Ib.* 491.

PLEADING—Continued.**3. Proof and Variance.**

Same; Proof and Variance; Place.—To avoid a possible variance between the allegations of proof of place, the pleader should allege different places in different counts, and not by disjunctive or alternative averments in the same count.—*B. R. L. & P. Co. v. Nicholas*, 491.

4. Conclusions.

Same; Conclusions.—The count alleging that plaintiff was at a certain time at or near defendant's station, where there was a public street, thoroughfare or crossing, and that defendant's motorman, knowing of her peril, negligently and wantonly ran a car over the crossing, and against or so near plaintiff that she was knocked or caused to fall into a culvert, states a mere conclusion, and was not good as a count for wanton injury.—*B. R. L. & P. Co. v. Nicholas*, 491.

Pleading; Construction.—Where the first count of the complaint after stating the relation of the parties, alleged that as plaintiff arose from her seat in defendant's street car preparatory to alighting she was thrown violently against a seat by the negligence of defendant in suddenly moving the car forward with a jerk; and counts 2 and 3 were similar except that they charged the injury to be the proximate consequence of the negligent way in which defendant conducted itself in and about her carriage, concluding with the words "as aforesaid," such words should not be construed as referring the general averments of negligence to the particular facts previously alleged in the counts, but rather to the averred destination of the passenger in counts 2 and 3, and to the relation of plaintiff's wife to the defendant as averred in count 1.—*B. R. L. & P. Co. v. Wilcox*, 512.

Same; Conclusion.—Allegations that a bridge across a navigable stream constituted an unreasonable obstruction of navigation and was maintained without authority of law were mere conclusions of the pleader.—*Mauldin v. C. of Ga. Ry. Co.*, 591.

5. Definition and Construction.

Same; Definition.—Pleading is nothing more than affirming or denying in an orderly and proper manner the facts which constitute the ground of plaintiff's cause of action, and of a defendant's defense.—*B. R. L. & P. Co. v. Nicholas*, 491.

Same; Construction.—A pleading will always be construed most strongly against the pleader.—*Ib.* 491.

Pleadings; Necessity of Allegation; Construction.—Where the action was for injury to a passenger caused by a collision of the street car on which he was riding, with a railroad train, a complaint charging the relation of the parties, the collision and the injury, and averring that "said servant or agent in charge or control of said car, acting within the line and scope of his authority as such, wantonly or intentionally," etc., was not rendered uncertain in the use of the word "said," although no servant or agent had been mentioned before in the complaint, the word being superfluous and capable of being omitted because of a want of an antecedent to which it could refer.—*B. R. L. & P. Co. v. Goldstein*, 517.

Pleading; Construction.—Pleading will be construed most strongly against the pleader.—*Mauldin v. C. of Ga. Ry. Co.*, 591.

PLEADING—Continued.

6. Complaint and Demurrer.

Pleading; Complaint; Demurrer.—While a plaintiff cannot frame his declaration so as to leave the character of his action uncertain, yet a complaint which states a cause of action is not subject to general grounds of demurrer if it states a cause of action.—*Williams v. Lyon*, 531.

PRINCIPAL AND AGENT.

Principal and Agent; Proof of; Circumstantial Evidence.—Agency may be proved by circumstantial evidence, and may be inferred from other acts similar to the one in question.—*Republic I. & S. Co. v. Passafume*, 463.

PROPERTY.

Property; Title; Constructive Possession.—In the absence of an actual possession in another, title to land always gives constructive possession to the holder thereof.—*Moore v. Empire L. Co.*, 344.

Property; Timber; Ownership.—The owner of land is presumed to be the owner of the timber situated thereon.—*Williams v. Lyon*, 531.

PUBLIC LANDS.

Public Lands; Disposition of Title; Power of State.—The state cannot make laws disposing of title to the public lands belonging to the Federal Government, or laws by which a patent of the United States may be impeached or avoided.—*B'ham C. & I. Co. v. Arnett*, 621.

Same; Title; Legal and Equitable.—Title to public lands remains in the Federal Government until a patent is issued, although the purchase money is paid; the payment of the purchase price, however, vests the equitable title in the purchaser, and the government has only the bare, legal title in trust for the purchaser, and, except as against the United States and those claiming under it, the state may attach to such equity such incidents and qualities of property as it pleases, and may render a final certificate of payment evidence of title in the holder sufficient to maintain or defeat an action for possession as is done by section 3980, Code 1907, unless an adversary title is shown by a patent issued to another.—*Ib.* 621.

Same; Patents; Entry.—A patent to public lands relates back to the date of entry, and the title acquired by the patent inures to the benefit of the patentee's prior grantee, though by quit claim or involuntary conveyance; so, where the commutation payment for public lands was made for the benefit of infant heirs of a deceased entryman, and they received a certificate of final payment and became entitled to a patent, the title acquired by the patent subsequently issued related back to the date of the certificate and inured to the benefit of a purchaser at a sale by a guardian of the heirs pursuant to a proper order of court.—*Ib.* 621.

QUIETING TITLE

Quieting Title; Relief.—Where the bill authorized the cancellation of a deed as a cloud upon title as against the grantee in the deed, the same relief will be authorized as against all deriving their claim of title from such deed.—*Dixie Grain Co. v. Quinn*, 205.

Quieting Title; Admissions of Answer; Proof.—Where the bill to quiet title alleged that complainants are in the peaceable possession of, and owned, the land, an answer merely denying that complainants are owners of the land admits the peaceable possession of

QUIETING TITLE.—Continued.

the complainant; and where the evidence, aside from the admission, establishes peaceable possession in complainants, respondents must show title superior to complainants' right of possession to defeat a decree for complainant.—*Vandegrift v. Shortridge*, 275.

Same; Decree; Transfer of Title.—A decree quieting title of land in an heir as against the grantee of the heir's ancestor, rendered in a suit against such grantee, does not have the effect to transfer title to the heir, but estops the grantee of the ancestor from asserting title as against such heir.—*Id.* 275.

Quieting Title; Title in Possession.—The bill examined and held not maintainable as a bill to quiet title, either under the statute or otherwise, complainant not being the present owner or claimant, or in possession.—*Farrow v. Sturdivant Bank*, 283.

Quieting Title; Constructive Possession; Minerals.—Where the owner conveyed the surface rights to certain land, reserving the minerals, and the grantee went into possession of the surface, and he and his grantees, including complainant had remained in possession since 1874, no one having any separate actual possession of the minerals, the possession of the minerals accompanied the possession of the surface and complainant having acquired title to the minerals by adverse possession, was in the constructive possession thereof, and entitled to file a bill to quiet title to the minerals.—*Moore v. Empire L. Co.*, 344.

Same; Grounds; Fraud.—A complainant in a bill to quiet title cannot raise the issue that the interest of the respondents was acquired from the heirs of the original holder by fraud.—*Id.* 344.

QUO WARRANTO.

Quo Warranto; Grounds; Public Office; Trial of Title to.—The provisions of section 5453, Code 1907, do not authorize quo warranto to oust persons from office on the ground that the clerk and inspector officiating at the election at which such officers were declared elected, were incompetent to act as such clerk and inspector, whether or not their incompetency would invalidate the election if properly raised on a contest of the election.—*State ex rel Blish v. Thomas*, 665.

RAILROADS.

See Carriers; Master and Servant; Street Ry.

1. Injury to Animals on Track.

Railroads; Injury to Animal; Burden of Proof.—Section 5476, Code 1901, is not confined in its operations as to persons, stock, or property, to injuries sustained only at the points covered by the preceding sections.—*Ex parte Southern Ry. Co.*, 486.

REFORMATION OF INSTRUMENTS.

Reformation of Instruments; Validity After Reformation.—A deed by a married woman will not be reformed as to the grantee named therein where, after reformation the deed would be void, because of the failure of the husband to join therein as required by section 2707, Code 1876.—*Jackson L. Co. v. Bass*, 169.

SALES.

See Contracts.

1. Breach and Damages.

Sales; Damages; Breach.—The measure of damages for breach of an agreement to deliver personal property at a particular time and place is the market value of such property at such time.—*Heard & Lee v. Heard*, 230.

SET-OFF AND COUNTER CLAIM.

Set-Off and Counter Claim; Equitable; Non-Residence.—The non-residence of a party against whom a set-off is claimed is of itself ground for equitable relief, allowing the set-off, and also good ground for recoupment.—*Mackintosh v. Stewart*, 328.

SPECIFIC PERFORMANCE.

Specific Performance; Deed by Wife.—Where the deed would be void because the husband did not join under section 2707, Code 1876, specific performance of the delivery of a deed by a married woman will not be granted.—*Jackson L. Co. v. Bass*, 169.

Specific Performance; Discretion of Court.—The right to a specific performance of a contract is not a matter of absolute right; it rests in a measure at least in the sound judicial discretion of the court to be exercised according to the principles of equity.—*Gachet v. Morton*, 179.

Same; Contract; Certainty.—Before the courts will specifically enforce a contract it must be made to appear by the pleadings that the contract sought to be enforced is the real contract made between the parties, and not one which the court is asked to make for them, although one they ought to have made.—*Ib.* 179.

Same; Variance.—Where the bill alleged a contract for the purchase of lands for cash, payable at a fixed time, and the proof showed that the contract as alleged was substantially modified by the parties to provide for the payment only when the vendor's wife should join, she having refused to join in the conveyance, there was a material variance between the allegations of the bill and the proof.—*Ib.* 179.

STATUTES.

See Constitutional Law.

1. Construction.

Statutes; Construction.—In construing a statute, the courts will give effect to the plain and validly expressed intention of the legislature.—*State ex rel. Wilkinson v. Lane*, 646.

2. Local Laws.

Same; Local Laws.—The acts creating Commission form of government in cities having a certain form of government are not local acts.—*State ex rel. Wilkinson v. Lane*, 646.

STREET RAILWAYS.

1. Use of Streets.

Street Railways; Use of Streets; Right of Abutters.—Where a street car company, under municipal authority constructs an additional track on a street to afford double track facilities, it is not rendered liable to an abutting owner for taxes paid by him for paving the street.—*B. R. L. & P. Co. v. Smyer*, 121.

2. Persons on Track.

Street Railways; Rights of Pedestrian; Crossing Track.—All persons have a right to cross a railway track at a proper crossing, or otherwise, but they have no right to loiter thereon nor use the track as a pathway longitudinally, unless the track is laid at grade in a public highway so as to form a part thereof.—*B. R. L. & P. Co. v. Nicholas*, 491.

Same; Complaint; Negligent Trespass.—A count averring that plaintiff was near defendant's station for the purpose of taking pas-

STREET RAILWAYS.—*Continued.*

sage on one of its cars, and was struck by one of its cars, running at a speed prohibited by the city ordinance, but which does not attempt to allege that plaintiff was crossing the track, or was in a public highway, fails to negative the fact that plaintiff was walking along or loitering upon the track, or attempted to board the car while it was in motion at a high rate of speed, and hence, shows that plaintiff was a trespasser under the rule of construing pleading against the pleader.—*Ib.* 491.

Same; Persons Near Track; Showing Negligence.—A count averring that the point at which plaintiff was injured was where a public thoroughfare or other crossing crossed its track, and that plaintiff was standing at the crossing, and that defendant's car was negligently run so close to her as to cause her to fall into a culvert, but which does not allege that she was rightfully at that place, fails to show any breach of duty owing plaintiff by defendant.—*Ib.* 491.

SUBROGATION.

Equity; Subrogation; Maxims; Right to.—One who seeks to have the doctrine of subrogation applied must come into court with clean hands; hence, where the purchasers of a mule did not pay the debt which the mule was mortgaged to secure, but were found guilty of conversion at the suit of the mortgagee, they cannot be subrogated to the claim of the mortgagee against the mortgagor, although without actual notice of the existence of the mortgage.—*Galliland v. Williams*, 173.

TENANCY IN COMMON.

Tenancy in Common; Conveyance by; Possession of Grantee; Effect on Co-Tenant.—The possession of a tenant in common, without more, does not operate as a dis-selsin of the other co-tenants; to operate as a dis-selsin there must be a repudiation of the rights of the co-tenants, and a claim to exclusive ownership, brought home to their knowledge.—*Kidd v. Borum*, 144.

Same.—The knowledge or actual notice of a conveyance by a tenant in common to a stranger purporting to convey the entire estate, and possession taken under such conveyance, starts the running of the statute against the co-tenant, and actual, notorious and exclusive possession by the grantee establishes title as against them.—*Ib.* 144.

Same.—The burden of proving actual knowledge or notice to tenants in common of the execution of a conveyance by one co-tenant purporting to convey the whole estate, and possession and claim of ownership by the grantee under such conveyance, rests on such grantee, and those claiming under him.—*Ib.* 144.

Same; Laches.—Where a tenant in common for life conveys the fee and the grantee entered into possession claiming the fee, and he and those claiming under him hold the actual, notorious, continuous, and exclusive possession for more than thirty years, the co-tenants for life were deprived of their interests.—*Ib.* 144.

TRADE MARKS.

Trade Marks; Infringement; Issue and Proof; Variance.—Where the bill charged that the respondents had sold and represented to the purchasing public by unfair and fraudulent trade competition products known as Viva, and that such customers had been deceived and defrauded to the injury of complainant's business, it was not supported by proof that salesmen or drivers of the respondent had made such fraudulent representations as to the product they sold

TRADE MARKS—*Continued.*

being complainant's product, there being no tendency to show that the respondent himself was guilty thereof or ratified the acts of his agents.—*Pippin v. Harris*, 306.

Same; Burden of Proof.—In an action to restrain unfair and fraudulent business competition, complainant had the burden of proof.—*Ib.* 306.

TRESPASS.

Trespass; Ownership.—Ownership of land imputes possession so as to support an action of trespass against a mere trespasser.—*Williams v. Lyon*, 531.

Same; Defenses; Adverse Possession.—The owner of land cannot maintain an action for damages for the cutting of timber by one holding possession under an adverse claim.—*Ib.* 531.

TRIAL.

1. Objections to Evidence and Instructions.

Trial; Objections to Evidence; Sufficiency.—Where a defendant does not object to a question, it is not error to overrule his motion to exclude a relevant answer.—*Sanders v. The State*, 35.

Same; Objections to Instructions.—A single objection to a part of the charge involving several propositions, some of which are correct, is properly overruled.—*Ib.* 35.

Trial; Objections to Testimony; Motion to Exclude.—Where no objection was made to a question to which there was a responsive answer, the court will not grant the other party a motion to exclude it.—*McLaughlin v. Beyer*, 427.

2. Exceptions to Evidence.

Trial; Exceptions to Evidence; Necessity.—The fact that exceptions were taken to testimony that a witness was present when another person was taken to see if she could identify defendant as a man she saw previously, were not sufficient to preserve objections to subsequent hearsay testimony that such person did so identify the accused.—*Watson v. The State*, 53.

3. Remarks of Court.

Trial; Remarks of Court.—Where a defendant offered a communication to a newspaper purporting to have been signed by the deceased, without showing by whom it was written, and the state interposed no objection to its admission, the remarks of the trial court that the state had consented for it to go in without objection as having been signed by this young man, that the court did not think the court would have permitted it to go in if there had been objection, but that it was in, and any further question as to deceased's connection with it was immaterial at that time, did not have the effect to so weaken or destroy the force of the evidence offered as to be reversible error.—*Jones v. The State*, 63.

4. Conduct of Court.

Trial; Conduct; Power of Court.—The trial judges should protect defendants in criminal cases from the acts of the prosecuting attorney which may tend to improperly influence the jury against them, and the court should, on its own motion, if necessary, discharge the jury.—*Simon v. The State*, 90.

Same; Improper Conduct of Prosecutor.—Where the improper question of the prosecuting attorney and his improper remarks were excluded by the court at the request of defendant, but the defendant

TRIAL—Continued.

did not move to discharge the jury and enter up a mistrial, this court cannot reverse the action of the trial court, however harmful the acts of the solicitor might have been; such matters cannot be reached by motion for new trial as the appellate court will not review the action of the trial court in passing on motions for new trials in criminal cases.—*Ib.* 90.

5. Argument of Counsel.

Trial; Argument of Counsel.—While it is improper for the court in its charge to the jury to state that plaintiff's counsel had so ably stated the law of life expectancy that it was unnecessary for the court to rehearse it, yet where it appeared that counsel had properly stated the law, it cannot be said that the court's charge was erroneous.—*Republic I. & S. Co. v. Passafume*, 463.

6. Exclusion of Evidence.

Trial; Exclusion of Evidence; Offer of Proof.—Where the record does not disclose the evidence expected to be elicited by the questions, the court will not be put in error for sustaining objections to such questions.—*Owen v. A. G. S. R. R. Co.*, 552.

TRUSTS.

1. Failure of.

Trusts; Failure; Lack of Trustee.—A trust properly created will not be permitted to fail for the lack of a trustee.—*Kidd v. Borum*, 144.

2. Resulting.

Trusts; Resulting; Right to Enforce.—Where land was owned in undivided interests by a mother and her son, and the mother was illiterate and reposed absolute confidence in her son, and he misled her to believe that their common funds had been used to discharge a lien against the lien, when in fact, he permitted the land to be sold under the lien to one from whom he afterwards purchased in his own name and without his mother's knowledge, the mother's right to enforce a trust as to a one-half interest in the proceeds of the sale, made by the son, is shown.—*Lovell v. Felkins*, 165.

Same.—Under the facts in this case, the complainant had a reasonable time, after discovery of the fraud, within which to file a bill to enforce the trust.—*Ib.* 165.

VENUE.

Charge of, see Criminal Law, § 3.

VENDOR AND PURCHASER.

Vendor and Purchaser; Bona Fide Purchaser; Recording Mortgage; Notice of Sale.—The rule that the recording of a mortgage containing a power of sale is notice to the world of a sale under the power does not conclusively charge subsequent purchasers with knowledge, unless such purchaser failed to make the proper inquiry, in which case the presumption of notice is conclusive.—*Dizie Grain Co. v. Quinn*, 208.

Vendor and Purchaser; Lien; Enforcement.—The evidence considered and it is held that it falls to show an indebtedness of the purchaser to the vendor in such a sense as to sustain the burden on complainant to show such indebtedness.—*Thornton v. Esco*, 241.

Same.—Where the suit was to enforce a vendor's lien on property that had been sold and transferred by the purchaser a denial by the purchaser's transferee of any indebtedness due from the

VENDOR AND PURCHASER—Continued.

original purchaser to his vendor on account of the purchase money raises an issue of fact to be determined by the appellate court on consideration of the evidence, in which no weight can be given to the decision of the Chancellor (sec. 5955, Code 1907).—*Ib.* 241.

Vendor and Purchaser; Lien; Application; Real and Personal Property.—A vendor's lien is a creature of equity arising upon the conveyance of land to prevent an unconscionable vendee from retaining the land without paying the purchase price, but it has no application to personal property, and does not arise in case of a sale of both real and personal property under a single contract for a gross sum.—*Hunvey v. Gaines*, 288.

Same; Enforcement; Complaint.—Under a bill alleging the sale of a small parcel of land on which was situated a sawmill, shingle and grist mill, and cotton gin combined which had been operated since 1897, describing the land by metes and bounds, it will be assumed, on demurrer to the bill, that the machinery was so attached as to be a part of the realty, and that hence, the conveyance was solely a conveyance of real property and sufficient to sustain a vendor's lien.—*Ib.* 288.

Vendor and Purchaser; Cash; Purchase Price; Unpaid Balance; Burden.—Where a testatrix sold and conveyed land by deed reciting that in consideration of the assumption by the grantee of a mortgage indebtedness, and \$1,800, "to the grantor in hand paid by the grantee" the deed indicated a cash transaction, and in a suit to fix the vendor's lien on the land as to the \$1,800, the burden was on complainant to prove that the same was not paid, and that the transaction was in fact a sale on credit.—*Daughdrill v. Lockhart*, 338.

Vendor and Purchaser; Bona Fide Purchase; Deed as Mortgage.—Bona fide purchasers from one holding under a deed absolute on its face are protected against the grantor in such a deed even though the instrument in reality be a mortgage.—*Nelson v. Wadsworth*, 361.

WATERS AND WATERCOURSES.

Water and Water Courses; Obstructions; Measure of Damages.—Where an obstruction in a stream causes a constant overflow of another's land, the measure of damages is the reasonable value of the land permanently overflowed, and the diminished value of the remainder of the tract not overflowed.—*Gloss-S. S. & I. Co. v. Mitchell*, 576.

Same.—Where due to the obstruction of a stream the overflow of another's land is not permanent, but causes irreparable and permanent injury to the freehold, the measure of damages is the difference between the value of the premises with and without such injury at the time thereof.—*Ib.* 576.

Same.—Where injury to land by overflow is not permanent, and the premises may be restored to their original condition, the measure of damages is the reasonable expenses of restoring the premises plus the difference in their reasonable rental value with and without the overflow during the period thereof.—*Ib.* 576.

Same.—Where there was evidence of irreparable injury to land caused by an overflow the duty devolved upon plaintiff to furnish such evidence as to the nature and extent of the damage and the reasonable cost of its complete reparation as would enable the jury to ascertain or estimate the money value of the injury.—*Ib.* 576.

Same.—The damage for the difference between the rental value of the property with and without the damage resulting from the

WATERS AND WATERCOURSES.—*Continued.*

overflow is not to be determined by the difference between the amount of rents stipulated for or collected before and after the overflow and damage, since such amounts would be affected by too many unrelated contingencies.—*Ib.* 576.

Same.—Where lands of another are overflowed by reason of an obstruction in a stream and rent paying tenants are thereby driven out and do not return, and after the houses are repaired and made fit for occupancy, the owner is unable after reasonable efforts to re-rent them, the loss of rents during such period of vacancy is not a proper subject of recovery; the recovery for diminished rental value meeting the requirements of substantial justice, especially as such recovery is allowed as an injury to the land, whether there is any subsequent diminution in the actual rents or not.—*Ib.* 576.

Same; Evidence.—In an action for overflowing plaintiff's property evidence of the reasonable cost of repairs to the building was not admissible unless it was shown that such repairs were confined to the injuries caused by the overflow, and such costs restricted to their reparation only.—*Ib.* 576.

Same.—In an action for overflowing plaintiff's premises it was competent on the question of diminution in rental value to introduce evidence as to the amount of rent customarily paid by the tenants of the several houses on the land before and after the damage.—*Ib.* 576.

Same.—Evidence that some of the houses on the premises overflowed were vacant after the overflow, was not competent, especially in view of other evidence that the houses had not been continually occupied, and were vacated, more or less, and also that a number of the houses were not touched by the overflow and may have been vacant from other causes.—*Ib.* 576.

Same.—On the question of computing damages, it was competent to show by a witness acquainted with the stream and its flowage for thirty years, that he warned defendant that the pipes placed by it were not sufficient to carry off the water.—*Ib.* 576.

Same.—Where the allegation in the complaint was that plaintiff was the owner and in possession of the premises overflowed, and the evidence showed that he was in possession under a claim of ownership, there was no variance nor failure of proof, since possession under a claim of ownership imports ownership as against a tortfeasor.—*Ib.* 576.

Waters and Watercourses; Pollution of Stream; Prescriptive Right.—The fact that a corporation has acquired a prescriptive right to so pollute a stream as to greatly impair its usefulness to a lower riparian owner does not give it a right to burden the lower estate by continuously depositing in the stream debris from its mining operations, which is carried down the stream and deposited upon the lower estate, tending eventually to destroy its value.—*Sloss-S. S. & I. Co. v. Morgan*, 587.

Same; Evidence to Title.—Where the action was by a lower riparian owner for damages to his lands from pollution of a stream, evidence that the owner had lived on the land for fifty years claiming to own it, with an intermission at one time of several years, and had lived there continuously for the last fifteen years exercising acts of ownership, was sufficient to establish his title without introducing his muniments of title in evidence, where there was no proof of ownership in another.—*Ib.* 587.

Same.—Although all the deposits may not have been made during the limitation period pleaded, evidence of the value of land

WATERS AND WATERCOURSES—*Continued.*

affected both before and after the deposits upon the land of which plaintiff complained was properly admitted, at least as against a general objection.—*Ib.* 587.

WILLS.

1. Construction.

Wills; Construction; Intention of Testator.—A will must be considered as a whole for the purpose of ascertaining the intention of the testator.—*Kidd, et al. v. Borum*, 144.

Same; Estate Devised.—Where a testator, who had been twice married, declared in his will that the children of his first marriage had by way of advancement, received a part of his estate, and that he had by a deed conveyed to the second wife and her children, by means of trustees with power to demand of his executors the bequest therein, and gave to his second wife and her children all his real estate in a certain county, and personal property for the use of his wife and her children, for the life of the wife with remainder to the children, and the deed mentioned conveyed to trustees other land in trust for the support of the wife and her children during her life, with remainder to her children, and directed the trustees to demand and recover of his executors any gift to the wife and the children made by the will, the real estate devised not having been conveyed to the trustees, the will when considered in connection with the deed, made the wife and her children at the time of testator's death tenants in common of an estate for life, with a remainder in fee of the whole estate to all of her children.—*Ib.* 144.

Same; Instruments Referred to; Effect.—Where a will, executed immediately after the execution by testator of a deed of trust which was duly acknowledged and recorded, referred to the deed, the deed, though not probated as a part of the will, could be considered to aid in the construction of doubtful provisions of the will as a part of the attendant circumstances to which the court could look in arriving at the intent of the testator.—*Ib.* 144.

Wills; Construction.—Every will, deed or other written instrument should be so construed, if possible, as to give some effect thereto.—*Ashurst v. Ashurst*, 401.

WITNESSES.

1. Contradicting or Impeaching.

Evidence; Predicate; Presumption.—Where the only defect in a predicate for the contradiction of a witness was the failure of the record to show that a particular time and place was fixed for the conversation as subsequently proved by the impeaching witness, and where the questions to the witness are not set out, and there is nothing in his denial to negative the fact that the time and place were fixed when he was questioned as to his conversation, the appellate court will presume that the time and place were embraced in such questions.—*Ex parte State*, 4.

Witnesses; Contradictions; Interrogatories in Another Suit.—Where a defendant failed to comply with an offer of the court to permit in evidence the answer to one of the interrogatories propounded to an infant plaintiff, if he would show that it was signed by plaintiff, and contradicted her present testimony, the court could properly exclude the interrogatories offered by defendant and taken in another suit for the purpose of contradicting plaintiff.—*McLaughlin v. Beyer*, 427.

WITNESSES—Continued.

Witnesses; Contradiction.—While one offering a witness in general represents him as worthy of belief, and cannot impeach his general character for truth or impugn his credibility by general evidence tending to show him unworthy of belief, yet he may prove any fact by other competent witnesses in direct contradiction of such witness though the collateral effect is to show such witness generally unworthy of belief, and under some circumstances may ask him whether he has not made other inconsistent statements.—*Jeebles-U. Conf. Co. v. Booze*, 456.

2. Examination and Cross.

Witnesses; Examination and Cross; Defendant.—Where a defendant as a witness for himself testified that he drank heavily on the afternoon of the killing, and was drunk when the homicide occurred, he could be properly asked on the cross why he drank so heavily that afternoon.—*Gilmer v. The State*, 23.

Witnesses; Examination and Cross; Defendant as Witness.—Where a defendant appears voluntarily, is sworn and testifies as a witness, he is properly permitted to be cross-examined as any other witness.—*Adams v. The State*, 58.

Same; Examination and Cross.—Where a witness for defendant had been examined at length by defendant, and then cross-examined by the State, whether or not the defendant will be permitted a re-direct examination as to matters provable on the direct examination is addressed to the discretion of the trial court, and will not be reviewed unless abused.—*Jones v. The State*, 63.

Same; Scope.—The number of persons who had told defendant about the reports claimed to have been circulated by deceased should have been brought out on the direct examination of defendant as a witness, the charge being murder and the defense insanity, and the court will not be put in error for declining to permit such testimony on the re-direct examination of defendant; especially where it appeared that it would have been a mere repetition of facts already stated.—*Id.* 63.

Witnesses; Examination; Leading Question.—A question by defendant's counsel to a witness, referring to defendant, "who was after him?" was not improperly disallowed, as it was both leading and suggestive.—*Bishop v. The State*, 85.

Witnesses; Examination and Cross.—Where a plaintiff, a negro, was going to consult a physician having an office in defendant's building, had gotten into an elevator reserved for whites, and was kicked by the servant in charge of the elevator and injured, and defendant's only contention was that he had gotten into the wrong elevator, and that the servant did not discover his color until he reached the floor plaintiff wanted to disembark, it was within the discretion of the court as controlling cross examination to refuse to permit defendant to ask him what was the matter with him, and whether before that he had had a similar disease.—*Empire Imp. Co. v. Lynch*, 473.

3. Competency.

Witnesses; Competency; Wife of Accomplice.—On a trial of co-defendants, where a severance has been demanded and granted, the wife of a co-defendant not on trial is a competent witness against her husband's alleged accomplice so long as she is not required to testify to facts tending to incriminate her husband.—*Watson v. The State*, 53.

WITNESSES.—*Continued.*

4. Corroboration.

Witnesses; Corroboration; Previous Declarations.—Where the mother of defendant had testified to the insanity of defendant, her declarations as to his insanity made to the father of defendant, were not admissible.—*Jones v. The State*, 63.

1-28
11/12/14

HARVARD LAW LIBRARY

Digitized by Google

